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No. 92-1201

IN THE
Supreme Court of the United States

October Term, 1992

ARMSTRONG WORLD INDUSTRIES, INC.,
Petitioner,

v.

THE INDUSTRY NETWORK SYSTEM, INC.
AND ELLIOT FINEMAN,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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INTRODUCTION

Taken at face value, the petition for certiorari by Armstrong World Industries (Armstrong) amounts to little more than the assertion that the Court of Appeals for the Third Circuit misapplied settled law in a fact-intensive case -- a reality that even Armstrong itself seems to recognize, since the primary relief it seeks in this Court is not plenary briefing and argument, but summary reversal. Even crediting Armstrong's arguments, there is no warrant to expend this Court's limited resources on this case, either as a matter of summary consideration or plenary review:

- Armstrong's argument is chiefly a sufficiency-of-the-evidence claim. This case turns on its own particular facts and has no precedential implications. As the court of appeals explained, "[a] thorough review of the record is necessary because this appeal is so fact specific." Pet. App. 5A.[1]

- This case contains parallel claims under federal and state antitrust law, as well as under state tortious interference law, so that any decision by this Court would likely be irrelevant to the outcome of this case.[2]

- This case is being remanded for a new trial, so that if the jury were to return a verdict for plaintiff-respondent The Industry Network System (TINS) on its federal antitrust claim, Armstrong could once again seek review in this Court. Consideration of the case by this Court is premature at this time.

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[1] Citations to the Appendix to the petition will be styled "Pet. App. ____A." Citations to the Joint Appendix in the court of appeals will be styled "JA____."

[2] Armstrong's argument that TINS' state-law tortious interference claim would be "not likely to survive" if this Court were to rule that the inferences drawn by the jury and the court below were precluded by substantive federal antitrust law (Pet. 7 n.6), flies in the face of the doctrine of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938); *see also California v. ARC America Corp.*, 490 U.S. 93, 100-102 (1989). Because the case is being remanded for a new trial, Armstrong's reference (Pet. 7 n.6) to the punitive damages award and to *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S. Ct. 1032 (1991), is curious indeed -- especially since at trial Armstrong made a strategic decision not to object to the district court's jury instructions on punitive damages and therefore in any event would be barred under Federal Rule of Civil Procedure 51 from raising any objections now.

Review would be inappropriate even if Armstrong's arguments were credited. But Armstrong's allegations cannot be credited. Indeed, the entire petition for certiorari rests on blatant and wholesale mischaracterizations of the decision below. For example, the premise of the first question presented -- that the court of appeals' judgment rested on "a single oral comment by petitioner's local sales manager to one distributor-customer" -- is a complete fabrication. The second question seizes on one off-hand phrase in the court of appeals' opinion and simply ignores the court's extensive legal analysis. The third was not even raised below and in any event has no merit.

The Third Circuit denied panel rehearing and rehearing *in banc* in this case. This Court should similarly deny review.

STATEMENT OF THE CASE

Armstrong accuses the court of appeals of basing its judgment on insufficient evidence, but then omits from its petition the most salient evidence on which the court relied. Armstrong's Statement of the Case also contains numerous errors and violates the elementary canon of appellate practice that the evidence is to be construed in the light most favorable to the party opposing judgment as a matter of law -- in this case, TINS. There has been no trial yet on TINS' Sherman Act § 1 claim, but there is a wealth of evidence in the case from which a jury could infer the existence of an illegal agreement between Armstrong and Stern according to which Stern would withdraw from TINS. Armstrong's suggestion that the judgment below rests on impermissible inferences is nonsense.

In brief, the facts are these:

(1) TINS was a highly effective means of enhancing the business of flooring distributors, run by Elliot Fineman, a national expert in the flooring industry. It was formed in 1983 as the subdivision of a very successful consulting company, Pet. App. 8A, and was hardly the fly-by-night operation that Armstrong implies. TINS enjoyed a positive cash flow at the time of its destruction by Armstrong. JA3240-43.

(2) Armstrong was the dominant supplier of resilient flooring in the United States. Pet. App. 7A-8A. It was 3.5 times larger than its nearest rival and 50% larger than its three principal competitors combined. JA1366, 7590. This was not due to Armstrong's efficiency but due to barriers to entry, including a system of captive distributors and relatively high fixed costs. Pet. App. 56A-60A; JA744, 1616, 3764, 7446. Armstrong exercised enormous market power over its distributors, and viewed the development of a dominant video network as critical, Pet. App. 53A-56A, and as the "Secret Weapon" and a "preemptive strike" in its plan to increase its dominance of the resilient market. JA1500-01, 7279, 7791, 7799. In the fall of 1983, however, Armstrong found itself three years behind TINS' competing video network, which was quickly enlisting many of Armstrong's own distributors. Pet. App. 9A-10A.

(3) Beginning in the fall of 1983 Armstrong actively discouraged all its distributors from enlisting with TINS. James Humphrey, general manager of the Armstrong Floor Division, sent a memo to all Armstrong district managers instructing them that "we feel this program conflicts with our future video plans and would not prove to be in our best interest." Pet. App. 11A. Robert Guzinsky, the Armstrong regional manager who oversaw Stern, parroted Humphrey's warning that "we feel this program conflicts with our mutual video plans and would not prove to be in our mutual best interest," Pet. App. 12A n.5, and added, "We are working constantly to develop logical video systems such as the program you will be showing shortly to your carpet Studios and feel we can satisfy both our needs in this area." *Id.* An Armstrong district manager wrote to marketing representatives:

> if you receive any inquiries regarding "TINS," please try to *discourage your wholesalers' participation* and offer suggestions on how their time could be directed towards a more important Armstrong sales effort. Additionally, please notify me as soon as the offer has been made to your wholesaler. *I want to make sure we all stay on top of this competitive effort.*

Pet. App. 13A n.6 (emphases added).

Armstrong's behavior in the fall of 1983 caused TINS to lose over $1.3 million in cash flow. JA1458. TINS threatened

Armstrong with an antitrust lawsuit, which culminated in a settlement agreement in which Armstrong paid TINS $42,000 and pledged to cease its interference with TINS' marketing of its video network. Pet. App. 13A-14A.

(4) In May 1984 Stern was in heavy financial trouble, was deeply in debt to Armstrong, and had compelling reasons to sign up with TINS, which it believed would greatly improve the company's fortunes. Pet. App. 79A.

(5) After taking prompt initial steps to implement the TINS program, Stern management suddenly and mysteriously stopped cooperating with TINS after the first week of June 1984. Despite the repeated urgings of TINS officials, Stern and its president, Alan Abrahamson, refused to take measures necessary to begin the program. Pet. App. 37A-38A. The record shows that Stern's change of mind came simultaneously with meetings between Stern and Armstrong officials at which TINS was discussed. Pet. App. 38A-39A.

(6) At a three-day training session on June 20-22, 1984, the Stern sales force exhibited an enthusiastic response to TINS. Pet. App. 40A-42A. Nonetheless, on June 22, 1984, Abrahamson told the TINS personnel, "to [their] complete surprise, that TINS was 'dead in the water'" and that Stern was withdrawing from the program. *Id.* at 42A. Abrahamson cited a host of reasons that were internally contradictory, completely contrary to the self-interest of the company, and ultimately unbelievable. As the TINS personnel satisfied each of Abrahamson's complaints and excuses, he invented another. A TINS official testified that he felt as if he had "entered the twilight zone" (JA2302) and that Abrahamson's supposed "reasons" were simply rationalizations for a predetermined course of action. JA2303.

(7) Fineman called Abrahamson at home the next day; and Abrahamson advised him that a principal reason for Stern's pulling out of TINS was leverage applied by Armstrong. Pet. App. 42A, JA1907-09, 1911-12.

(8) Stern's cancellation disrupted TINS' cashflow at a critical time when TINS was just beginning to recover from Armstrong's prior interference and led to TINS' financial ruin, as Armstrong knew it would. Pet. App. 15-16A, JA1764, 1773-75, 1781-82.

I. THE FIRST QUESTION IS NOT PROPERLY PRESENTED AND HAS NO MERIT

A. THE QUESTION IS BASED ON A DISTORTION THE RECORD

Armstrong seeks certiorari on the sufficiency of the evidence of TINS' Sherman Act § 1 claim, even though both courts below considered and rejected Armstrong's argument.[3] Armstrong's

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[3] The district court denied Armstrong's motion for summary judgment on sufficiency of the evidence, JA50, 54, and granted a directed verdict to Armstrong only on the basis of a radical and erroneous argument that Armstrong no longer defends. The district court ruled that, "[i]n this case, while it might be said that *there is a unanimity of purpose or common design and understanding to commit the tort of the disruption of the contractual relationship between Stern and TINS*, under no set of circumstances based on this record could the jury reasonably find that Stern shared Armstrong's purpose of eliminating TINS from competition in the video magazine market." JA 3680 (emphasis added). The district court acknowledged that the evidence indicated that "Armstrong and Stern were in *agreement*, that it was in Armstrong's best interest *and therefore in Stern's* to drop the TINS program." JA 3592 (emphasis added); *see also* A3700 (evidentiary ruling by district court that "there is sufficient evidence in the record of a conspiracy between Stern and Armstrong to abort the contractual relationship between Stern and TINS"). But the court rejected TINS' argument that the common purpose element of § 1 requires only that the conspirators "have a common purpose to engage in the acts alleged, not a common purpose of the ultimate goal." JA 3683.

The district court's holding that a distributor pressured into an agreement must be shown to have shared the manufacturer's underlying motive for engaging in the restraint of trade is utterly unprecedented and would eviscerate § 1 in the context of vertical agreements, because in almost every such case it is possible to define the interests of each party with sufficient specificity that they can be said to lack a "common motive." It can always be argued that a manufacturer is interested in eliminating a rival, whereas the captive distributor acts primarily in order to avoid punishment from its powerful patron. Thus, the court of appeals held, in a decision on which Armstrong does not seek this Court's review, that:

> the district court's novel approach is misplaced as it renders section 1 claims unavailable to private litigants suffering antitrust injury as a result of concerted action in a vertical matrix. Such a restrictive rule

attack on the court of appeals' opinion is completely unfair to the court and borders on outright misrepresentation.

1. The Court of Appeals Applied the Legal Test Sought By Armstrong

Armstrong's Petition for Certiorari makes it appear as if the Third Circuit simply flouted this Court's decisions in *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984), and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). The Petition asserts that the decision below stands in "sharp and unexplained conflict" with them. Pet. 8.

What Armstrong fails to mention is that the court of appeals discussed these cases *at length* and undeniably applied them to the facts of this case by requiring TINS to meet "a heightened evidentiary requirement" for its antitrust claim. Pet. App. 26A. The court held:

> In the antitrust arena, "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Matsushita*, 475 U.S. at 588 (explaining the holding in *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984)). Where a defendant's allegedly illegal activity may stem from either procompetitive or anticompetitive objectives, inquiry must be made to determine whether a permissible inference can be drawn in favor of the plaintiff.

Pet. App. 26A; *see also id.* at 78A. Armstrong's disappointment with the manner in which the court of appeals diligently applied this legal standard to the particular facts of this case is hardly a cert-worthy matter.

> fails to recognize the difference between motive and objective and would dramatically alter the antitrust landscape in a manner unjustified by either precedent or policy considerations.

Pet. App. 78A-79A.

2. The Court of Appeals Did Not Base Its Decision on Isolated Fragments of Evidence, As Armstrong maintains

The gravamen of Armstrong's argument that the court of appeals misapplied the *Monsanto/Matsushita* standard is that it based its decision on impermissible inferences and isolated fragments of evidence -- on one comment by an Armstrong manager, according to the first question presented. Such a contention is an egregious distortion.

The question of whether Armstrong had coerced Stern to withdraw from TINS was common to both the tortious interference and § 1 issues before the court of appeals. Even Armstrong is forced to concede that the same corpus of evidence formed the primary foundation for both claims. Pet. 6 (claims were "all based on the same alleged conduct of Armstrong"); *id.* at 7 n. 6 ("the inferences ... were the same for both the tort and antitrust claims"). The court of appeals exhaustively canvassed the evidence in the case in the section of its opinion dealing with the tortious interference claim, *see* 35A-43A, 48A, and chose not to reprint that analysis under its antitrust analysis later in the opinion. The court explained:

> Armstrong primarily reiterates an insufficiency of the evidence challenge to TINS' theory of conspiracy. If this were borne out by the record, then Armstrong's evidence that Stern acted independently and in accordance with its own business interests would prevail to defeat any conspiracy motive or theory. However, for the reasons provided above in Part III, we reject Armstrong's formulation of the reasonable inferences that may be garnered from the trial record.

Pet. App. 79A n.30.

Armstrong quite misleadingly purports to summarize the court of appeals' analysis of the antitrust claim at pages 10-11 of the Petition ("The Third Circuit's reasoning is set forth below verbatim"). Yet Armstrong does not recognize, let alone confront, any of the discussion *earlier* in the court of appeals' opinion that makes clear the ample evidence supporting the § 1 antitrust claim. For example, the Petition ignores the long history of Armstrong's attempts to eliminate TINS as a viable business entity; Armstrong's perception

of TINS as a competitive threat; the settlement agreement between TINS and Armstrong; Armstrong's knowledge of TINS' precarious financial condition as a result of the settlement negotiations; and Armstrong's violation of the settlement agreement and its renewed determination to destroy TINS by coercing Stern to withdraw from TINS. Pet. App. 48A. Stern was the first distributor TINS attempted to sign up after entering into the settlement agreement. A1710-12.

Similarly, the Petition fails even to mention the plethora of evidence indicating that Stern withdrew from TINS only as a result of pressure from Armstrong. Indeed, Abrahamson told Fineman privately that pressure from Armstrong was a principal reason for Stern's withdrawal. Pet. App. 42A, JA1907-09, 1911-12. Stern was in severe financial trouble, was deeply indebted to Armstrong, Pet. App. 36A, and desperately needed the help TINS could provide. Pet. App. 79A n.30. Stern withdrew from TINS in highly suspicious circumstances: for two weeks it enthusiastically followed all of TINS' directives for implementing the TINS program, Pet. App. 36A-37A, then suddenly and inexplicably stopped doing so just as Stern and Armstrong officials held at least one meeting at the end of the first week of June 1984 at which they discussed Stern's recent sign-up with TINS. Pet. App. 38A-39A. On June 7, an Armstrong district manager told Stern's president, Alan Abrahamson, that TINS "didn't make a lot a sense" because there was an "overlap" between TINS and Armstrong's video network. Pet. App. 39A. Although Abrahamson and the district manager denied any further meetings, Abrahamson's calendar indicated that the two played golf on the following day. Pet. App. 39A. On June 12, James Humphrey, Armstrong general manager, sent a "confidential" memorandum (in violation of the settlement agreement), instructing Armstrong managers that "if any wholesalers request Armstrong's participation [in TINS], either on a local level or a national basis, you should inform them that we are unable to offer any *assistance*. You should make sure that your representatives are not involved in any sales presentations on this system or any other program not provided by Armstrong." Pet. App. 39A-40A (emphasis added). The evidence showed that the reference to "assistance" meant that Armstrong would cut off critical promotions to distributors that signed up with TINS. JA159, 2408-09, 2466, 6170.

In addition, at trial Abrahamson offered transparently pretextual and contradictory reasons for Stern's withdrawal. Pet. App. 43A. For example, Abrahamson claimed that his sales force had negative views about TINS and that he decided to defer to their judgment because he had never seen an edition of the TINS videotape. JA4491-92. Yet several sworn witnesses testified that Abrahamson had been shown a TINS videotape on June 5 and "reacted positively to it." Pet. App. 38A. At trial Abrahamson claimed that he had taken a vote of the members of his sales force, JA4317, but at his deposition five years earlier he had denied doing so. JA4362. In short, a jury could "infer that Abrahamson simply trumped up a number of excuses and attempted to distance himself from responsibility for the decision." Pet. App. 43A.

Thus, Armstrong is simply wrong when it claims that its liability rests solely on the "overlap" and "it doesn't make a lot of sense" remark to Stern's president. This comment cannot be viewed in isolation, for there was a whole pattern of evidence that placed the remark in context and revealed its menacing and coercive nature. The court of appeals found that it could be inferred "that Stern's financial fragility led Abrahamson to perceive a threat in Roth's remarks about TINS as an overlap program and that Stern's financial dependence on Armstrong made Stern particularly susceptible to coercion." Pet. App. 42A-43A. The court of appeals reaffirmed the district court's finding that "Armstrong and Stern were in *agreement*, that it was in Armstrong's best interest *and therefore in Stern's* to drop the TINS program." JA3592 (emphasis added); *see also* A3700 (evidentiary ruling by district court that "there is sufficient evidence in the record of a conspiracy between Stern and Armstrong to abort the contractual relationship between Stern and TINS"). It was a tribute to Armstrong's absolute power over Stern that Armstrong officials did not need to say much in order to make themselves understood.[4]

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[4] In addition, although the court of appeals did not need to reach this question, the key fact is that Armstrong admitted that its officials talked about TINS with Stern's president at a critical time, just prior to Stern's withdrawal. Armstrong's claims about what was said are unimportant. Indeed, a jury would be free to disbelieve the testimony of Armstrong's district manager that he limited his comments to the "overlap" and it

The court of appeals concluded that, "[a]lthough Armstrong vigorously contested the existence of, or permissible interpretation of, each of these alleged facts, because we may not tread on the jury's credibility determination function, we must presume in reviewing this directed verdict that the jury would believe TINS' factual contentions." Pet. App. 79A n.30. The district court explained with respect to the § 1 claim that "questions of credibility which can only be resolved by the trier of fact permeate this record." A36. The court of appeals and the district court were right to leave the matter to a jury, and this Court should deny review.

3. Armstrong's Claims of Error Are Patently Unfounded

The mandate of *Monsanto* and *Matsushita* was clearly met in this case. There was ample evidence to exclude the possibility that Stern and Armstrong acted independently; there was ample proof that they had a common design and understanding that Stern should withdraw from TINS because such action was in Armstrong's interest; and there was ample evidence that such an objective was unlawful and, furthermore, that it led to TINS' demise.

Armstrong's attempt to caricature the court of appeals' reasoning by assigning deceptive labels to the court's analysis does not advance its cause. Armstrong insists on a showing of "coercion" or "threat" even though the court of appeals made precisely such findings and even though this Court's precedents do not require a showing of "coercion" or "threat" in order to prove "agreement" even in the vertical context. Armstrong also criticizes the "appeasement theory" (Pet. 13), but this analysis was simply the court of appeals' recognition that the inference that Stern withdrew from

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"doesn't make a lot of sense" remarks. A jury could credit the entry in Abrahamson's calendar that indicated that he played golf with the district manager on the following day, Pet. App. 39A, and could draw further inferences from the suspicious denials of Abrahamson and the district manager regarding the golf date. In sum, a jury could infer from Stern's behavior, Abrahamson's comment to Fineman, and the other circumstantial evidence in the case that Armstrong officials used much more direct language with Abrahamson.

TINS because of pressure from Armstrong was strengthened by the evidence that "Stern acted against its economic interest in reneging on distributing TINS." Pet. App. 83A n.32.

Next, Armstrong contends that there was no explicit "acquiescence" by Stern in the agreement that Stern would withdraw from TINS. Pet. 13. Yet such acquiescence was powerfully and unmistakably communicated by Stern's *action* in withdrawing from TINS. The point of the "acquiescence" requirement is to ensure that there is an actual "meeting of the minds" or "common scheme," *Monsanto*, 465 U.S. at 764 n.9; it does not mean that an explicit verbal utterance is necessary to prove a violation of § 1. This Court has long held that "business behavior is admissible circumstantial evidence from which the fact finder may infer agreement." *Theatre Enterprise, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537, 540 (1954); *see also Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939). The inference of agreement was especially strong in this case: Abrahamson told Fineman privately that he had acted as a result of pressure from Armstrong; Stern's action in withdrawing from TINS was economically irrational from Stern's perspective; and Stern's public excuses for its actions were utterly and transparently pretextual.

Finally, Armstrong attacks what it calls the court of appeals' "vicarious knowledge theory," (Pet. 14), without explaining the relevance of its attack to the court's decision. The court of appeals held that a jury could infer "that Abrahamson recognized a conflict between Armstrong's and TINS' videotapes and recognized Armstrong's anticompetitive goal" and that "a rational factfinder could draw the inference that Armstrong wanted to eliminate TINS from the video market so that Armstrong would not have to compete with TINS, and that Stern knowingly aided in that effort." Pet. App. 81A. Thus, there was a "meeting of the minds" and "conscious commitment to a common scheme" regardless of what Armstrong calls the "vicarious knowledge theory."[5]

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[5] In any event, by its "vicarious knowledge" theory, the court of appeals quite unremarkably meant that Stern was "chargeable with knowledge" of the probable effect of its actions. Pet. App. 82A. Vicarious knowledge was unnecessary, since Fineman told Abrahamson directly, before Stern's withdrawal became final, that the pullout would

Armstrong asks, "What should Armstrong and other manufacturers do to avoid future lawsuits like this one?" Pet. 15. They can simply refrain from violating the antitrust laws. Barring that evidently unthinkable course, they can honor settlement agreements rather than violating them; avoid mounting sustained and coordinated campaigns to destroy competitors by wrongful means; avoid a paper trail of incriminating documents; refrain from pressuring captive distributors to withdraw from beneficial contracts with competitors; or avoid any of the other myriad acts that led to the overwhelming mosaic of evidence against Armstrong here.

B. THE QUESTION HAS NO MERIT

Armstrong's petition rests on the assumption that *Monsanto* and *Matsushita* create a special heightened evidentiary standard in antitrust cases involving vertical restraints. There are two related flaws in Armstrong's theory.

First, Armstrong ignores this Court's decision last Term in *Eastman Kodak Co. v. Image Technical Services, Inc.*, 112 S. Ct. 2072 (1992), where this Court explained that "*Matsushita* demands only that the nonmoving party's inferences be reasonable in order to reach the jury, a requirement that was not invented, but merely articulated, in that decision." *Id.* at 2083. Notably, in the discussion of its first question presented Armstrong does not even *cite*, let alone attempt to distinguish, *Eastman Kodak*. That decision makes clear that Armstrong's arguments here are unfounded. *Matsushita* does not create some sort of fuzzy "heightened evidentiary standard" but merely recognizes that, "[i]f the plaintiff's theory is economically senseless, no reasonable jury could find in its favor, and summary judgment should be granted." 112 S. Ct. at 2083; *see also id.* at 2083 n.14 (describing *Monsanto* as holding that "to survive summary judgment there must be evidence that 'reasonably tends to prove' plaintiff's theory").[6]

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harm TINS. JA4513.

[6] Out of an abundance of caution, the court of appeals applied the heightened evidentiary standard advocated by Armstrong and assumed *arguendo* that it was not foreclosed by *Eastman Kodak*. *See* Pet. App. 27A.

Plainly, TINS' claims here are not "economically senseless." Armstrong had a powerful motive for destroying TINS, its video competitor, and thereby gaining dominance in what Armstrong viewed as a critical market. Pet. App. 53A-56A. Armstrong planned to launch its own video network -- which it termed its "Secret Weapon" and "preemptive strike" in its plan to increase its dominance of the resilient market, JA1500-01, 7279, 7791, 7799 -- but was three years behind TINS. Pet. App. 10A. In fact, as envisioned by its ten-year plan, Armstrong did increase its resilient market share to unprecedented levels after it destroyed TINS. JA1471, 1502, 7590, 7709.

Second, as Armstrong's motives to destroy TINS indicate, this is not a vertical case, but rather one with a distinct horizontal flavor. Unlike *Monsanto*, this case does not involve a terminated distributor who relies on complaints from competing dealers in order to prove the existence of an agreement between those dealers and the manufacturer. Because a manufacturer who terminates a successful dealer is not acting in its own rational interest, it is likely that the dealer has in fact been terminated for a legitimate reason and is using antitrust law as an excuse. But the logic behind *Monsanto's* holding that "something more than evidence of complaints is needed" to prove the existence of a conspiracy under § 1 in dealer termination cases, 465 U.S. at 764, is simply irrelevant here. Armstrong was not terminating a successful dealer but targeting a rival for elimination. This conduct, while socially undesirable, was financially rational from Armstrong's perspective. Stern, on the other hand, had strong reasons to remain affiliated with TINS. Stern's withdrawal was "against its economic interest," Pet. App. 83A n.32, and the evidence in this case indicated that it was caused by pressure from Armstrong. There is no danger here that an agreement would be "inferred merely from the existence of complaints," *Monsanto*, 465 U.S. at 763 -- there *were* no dealer complaints -- or from other kinds of "highly ambiguous evidence." *Ibid.*

No lower court decision cited by Armstrong is apposite here, for all of them involve terminated dealers in the resale price maintenance context, or other fact patterns lacking the horizontal component present in this case. This demonstrates not only that the question presented is without merit, but also that the factual features

of this case are sufficiently unique that it lacks precedential significance and does not merit this Court's review.

II. THE SECOND QUESTION RESTS ON A DISTORTION OF THE DECISION BELOW AND HAS NO MERIT

Armstrong maintains that the court of appeals used an improper "functional equivalence" test to reach the incorrect conclusion that TINS and the Armstrong video network were in competition. Armstrong's argument is wrong.

First, it is wildly inaccurate to say that the court of appeals applied a "functional equivalence" test. Armstrong quite incredibly ignores the court of appeals' formal articulation of the standard of review, in which the court of appeals outlined at substantial length the very "reasonable interchangeability" test that Armstrong accuses the court of rejecting! The court of appeals explained:

> We recently had occasion to set forth the legal contours of a relevant product market in *Tunis Bros. Co. v. Ford Motor Co.*, 952 F.2d 715 (3d Cir. 1991), *cert. denied,* 60 U.S.L.W. 3871 (June 30, 1992). For brevity's sake, we reiterate that definition here:
>
> The relevant product market is defined as those "commodities reasonably interchangeable by consumers for the same purposes." *United States v. E.I. Du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956); *SmithKline Corp. v. Eli Lilly & Co.*, 575 F. 2d 1056, 1062-63 (3d Cir.), *cert. denied,* 439 U.S. 838 (1978). Factors to be considered include price, use and qualities. *Du Pont de Nemours*, 351 U.S. at 404. Accordingly, the products in a relevant product market would be characterized by a cross-elasticity of demand, in other words, the rise in the price of a good within a relevant product market would tend to create a greater demand for other like goods in that market. *Id.* at 380, 400.

Pet. App. 51A. Moreover, the court of appeals explicitly applied the "reasonable interchangeability" test throughout its product market analysis, *see, e.g.*, Pet. App. 52A, 55A n.20, 56A, and held that:

> the record supports the jury's inference that retailers [the buyers of the respective video programs] may have perceived TINS' and Armstrong's video programs to be interchangeable. Both offered product information, sales training and techniques, and interviews with industry experts. Although Armstrong presented evidence of differences between the two video programs, the jury was free to disbelieve Armstrong's evidence.

Pet. App. 56A. Armstrong may disagree with the court's application of the "reasonable interchangeability" test, but it is astonishing for Armstrong to claim that the court did not apply the correct standard.[7]

Second, the evidence in this case, construed in TINS' favor, amply supported the court of appeals' conclusion that the two video networks were reasonably interchangeable from the standpoint of the floor covering retailers who purchased the tapes. Armstrong ignores a wealth of evidence that its video network for floor covering retailers was in "[e]xactly ... the same market" as TINS, JA1639, and was "competitive" with TINS, Pet. App. 13A n.6, because the programs "overlap[ped]." JA3021. As one Armstrong witness admitted, "[t]hey were essentially both retailer training programs, training retailers to be better merchants, to do a better sales job, and so forth." JA3040. The tapes, another Armstrong witness conceded, "were more than selling aids." JA4834. Armstrong used its distributors to supply its tapes to the same retailers targeted by TINS,[8] and, according to a 10-year plan, in 1984 Armstrong was on the verge of a massive expansion of its network to make it even more like TINS in format and content. JA1900, 7320-21, 7223, 7278-79, 7280, 7286, 7591. The district

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[7] Armstrong relies exclusively on a single, off-hand reference by the court of appeals, which noted in passing that one witness had said that the two video networks were "functionally equivalent." Pet. App. 55A. By using this phrase to describe trial testimony, the court of appeals was not adopting it as a legal test, and it is absurd for Armstrong to suggest otherwise.

[8] *See* JA1627-33, 1638-45, 1843-48, 1898-1900, 2430-31, 2529, 3833, 4778, 4886, 5270, 6132-33, 6139-41, 7288-90, 7316-22, 7351-56, 7358-59.

court held, JA206 n.32, 3615-16, 6718 -- and Armstrong did not dispute on appeal -- that Armstrong's planned expansion had to be considered in determining the relevant product market. Armstrong's claim that it provided its tapes to retailers on a "non-profit" basis, Pet. 17, is unsupported by the record, which reveals both that Armstrong earned a direct profit on the tapes, JA4826-27, and that it used them to increase its market share of the resilient flooring market. JA1500-01, 7279, 7791, 7797. The district court held that the jury, on this "uniquely factual" issue, "could rationally and reasonably find sufficient similarity between TINS' and Armstrong's video products to determine that a market for video magazines for floor covering retailers exists, occupied at one time by TINS and Armstrong and now by Armstrong only." JA192. There is no need for this Court to review this intensely factual issue.

III. THE THIRD QUESTION WAS NOT RAISED BELOW AND HAS NO MERIT

The court of appeals did not need to consider the unreasonableness of the restraint of trade represented by the Stern-Armstrong agreement because Armstrong did not *raise the issue before the court of appeals*. The district court had granted Armstrong a directed verdict on a legally flawed theory. *See* n.3, *supra*. In the court of appeals, Armstrong defended that decision on the alternative ground that *Monsanto* precluded the inference of conspiracy, but it never claimed that the district court's decision could be defended on the ground that, as a matter of law, the restraint was a "reasonable" one. That is why the court of appeals stated that the question of whether the restraint was reasonable did not "concern[] us here." Pet. App. 78A. For the Court's convenience, we attach as Appendix A hereto the entirety of Armstrong's appellee's brief dealing with the § 1 issue. The cases are legion, of course, that this Court ordinarily does not consider questions not raised below. *See, e.g., Sisson v. Ruby*, 110 S. Ct. 2892, 2894 n.1 (1990); *Heckler v. Campbell*, 461 U.S, 458, 468-469 n.12 (1983).

Furthermore, the question presented has no merit. Armstrong attempts to manufacture a circuit conflict by mischaracterizing the nature of TINS' § 1 claim. This is not a case merely of "vertical foreclosure" where a manufacturer denies a competitor access to its customers. Pet. 22-23. Here, Armstrong, upon learning about

TINS, embarked on a deliberate campaign to destroy its only competitor and, after weakening TINS financially through its pre-settlement interference, JA1686-89, 1698, 1707-08, applied the *coup de grace* by pressuring Stern -- who was the first distributor enrolled by TINS after the settlement agreement was signed and was critical to TINS' continued survival -- to withdraw from TINS. JA1697-98, 1775-78, 2544, 2548, 2553-57, 2848-64, 3542-43. TINS' cashflow was stretched to the limit, and it could not have signed up a new distributor to replace Stern.[9] JA1777-79, 1677, 2554. To construct its "circuit conflict," Armstrong omits entirely any mention of the court of appeals' finding that:

> Aware of TINS' precarious financial position from Fineman's disclosure during the 1983 settlement negotiations, Armstrong recognized its opportunity to disrupt TINS' recovering, or to eliminate TINS entirely by destroying TINS' agreement with Stern. Armstrong accomplished this by wielding both the general authority it exercised over its captive distributors and by applying more specific coercive pressure, available because of Stern's precarious financial position. ... [T]he jury could have found that despite a settlement agreement, Armstrong flagrantly disregarded its continuing obligations under the settlement agreement and deliberately reactivated its plan to clear out any competition for its future video network plans.

Pet. App. 48A. None of the cases on which Armstrong relies (Pet. 23) is apposite.

The "market reality" (Pet. 23) is that "Armstrong wanted to eliminate TINS from the video market so that Armstrong would not have to compete with TINS," Pet. App. 81A; that "the agreement between Armstrong and Stern [was] central to the demise of TINS,"

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[9] In addition, from TINS' perspective, the number of salespersons that a distributor had was crucial, since more salespersons meant that a distributor could sell more subscriptions to the TINS network. "Because Armstrong distributors typically employ more salespersons than distributors of other floor covering products, TINS especially targeted them as its distributors." Pet. App. 9A. For TINS, signing up Armstrong distributors was "critical." *Id.*

id.; that, after it destroyed TINS, Armstrong's share of the resilient market rose to unprecedented levels, JA1471, 1502, 7590, 7709; and that Armstrong's goal in eliminating its rival in the video market was an "anticompetitive" one. Pet. App. 81A; *see also id.* at 84A (holding that Armstrong and Stern "share[d] a commitment to a common scheme which has an *anticompetitive* objective") (emphasis added). TINS suffered antitrust injury because its injury stemmed from that which made Armstrong's conduct illegal.[10]

CONCLUSION

The Petition for Certiorari is completely without merit and rests on egregious distortions of the record and of the decision below. It should be denied.

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[10] The court of appeals concluded that "[t]he evidence falls short of demonstrating that Armstrong has at any time since 1984 captured monopoly power, or a dangerous probability of it, in the video market." Pet. App. 62A. But this surely does not mean that the restraint of trade represented by the Stern-Armstrong agreement was "reasonable" *as a matter of law*. A company can have *market* power and a restraint of trade can be unreasonable even if the company does not enjoy a *monopoly*. Armstrong's assumption that a restraint of trade does not violate § 1 if it does not lead to a monopoly (Pet. 22) erroneously equates the standards of § 1 and § 2 of the Sherman Act.

In any event, the "market reality" is that no new video network has arisen to compete with Armstrong. JA1860-63, 2127, 2212, 2909, 4891. Although when TINS was destroyed two former TINS distributors threw together a few videotapes in order to complete their customers' subscription periods so they would not have to refund any money, Pet. App. 61A, these efforts were simply productions of tapes and were not viable video networks (which include marketing, distribution, programming, supplying equipment, and other full-service features). Moreover, they did not convey the same type of information as TINS, and they ceased when the subscription periods ended. JA4227-28, 4262-63, 4861-63, 4891. Constructing a new network from scratch would be a formidable task, and no one has attempted it.

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APPENDIX

BRIEF FOR DEFENDANT-APPELLEE ARMSTRONG
in No. 91-5613 (3d Cir.), filed Dec. 23, 1991,
PART VI(F):

F. The District Court Correctly Dismissed Plaintiffs' Antitrust "Conspiracy" Claims Because There Was No Shared Anticompetitive Motive

The District Court dismissed all of plaintiffs' antitrust "conspiracy" claims under Sherman Act §§ 1 and 2 because "under no set of circumstances based on this record could the jury reasonably find that Stern shared Armstrong's [alleged] purpose of eliminating TINS from competition in the video magazine market." A3680. Plaintiffs argue that the District Court's ruling was erroneous on the theory that Armstrong "coerced" Stern's cancellation of the Letter of Intent, which plaintiffs assert was a legally recognized "coerced" conspiracy. Plaintiffs' argument is flawed both on the facts and the law.

The evidence consists only of (1) Roth's "doesn't make a lot of sense" comment; (2) Humphrey's internal memo advising that Armstrong could not provide any participation/assistance "in the [TINS] system"; and (3) the circumstantial evidence of Stern's June 5-20 conduct, which was a rational response to a business situation. Such evidence fails to establish any coerced conspiracy because it does not "conclusively exclude the possibility" that Stern acted independently in cancelling the Letter of Intent, *Link*, 788 F.2d at 923; *Monsanto*, 465 U.S. at 764, especially in light of the unequivocal testimony of the Stern witnesses (A4318-19, 5028, 5292) that their decision was independent.

Plaintiffs argue that the District Court erred in concluding that an antitrust conspiracy requires a common anticompetitive motive of the alleged conspirators. Br. 55. To the contrary, the lower court relied on *Columbia Metal Culvert Co. v. Kaiser Alum. & Chem. Corp.*, 579 F.2d 20, 36 (3d Cir.) *cert. denied*, 439 U.S. 876 (1978), which found no antitrust conspiracy because the evidence did not establish that the alleged co-conspirator "consciously shared" defendant's anticompetitive

purposes "to eliminate" a competitor. Third Circuit law has long required that proof of an antitrust conspiracy must include "satisfactory demonstration of a motive to enter an agreement" reflecting the conspiracy. *Venzie Corp. v. United States Mineral Prods. Co., Inc.*, 521 F.2d 1309. 1314 (3d Cir. 1975); accord *First Nat'l Bank v. Cities Serv. Co.*, 391 U.S. 253, 286-87 (1968).

Plaintiffs' evidence does not even rise to the level of being ambiguous on the conspiracy issue. But even if it were, "antitrust law limits the range of permissible inferences from ambiguous evidence", and if the alleged wrongful "conduct is consistent with other, equally plausible explanations," the claim should be dismissed. *Matsushita*, 475 U.S. at 588, 596-97.

neither the pleadings nor the pre-trial statement even hinted that TINS intended to pursue a "pure" non-leveraging section 2 claims. In its pre-trial statement, TINS explicitly spelled out its theory that Armstrong leveraged monopoly power in the resilient product market to dominate the video magazine market:

> Armstrong used its dominance in the resilient floor covering market to drive TINS out of business in the retail floor covering video programming market by intimidating a number of independent firms, floor covering distributors, not to do business with plaintiffs, and with regard to a number of distributors, to back out of letters of intent that they had entered into with TINS.

J.A. at 717-18. Moreover, TINS identified only a single legal issue pertaining to its section 2 claims in the pre-trial statement:

> A firm that uses its dominance in one market (here the resilient floor covering market) to destroy competition in another market (here, the video programming for retail floor covering establishments sub-markets) violates the Sherman Act. *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951).

J.A. at 780. The district court did not abuse its discretion in limiting TINS's section 2 claim to its leveraging theory.

Three subsidiary elements are common to both TINS' monopoly and attempted monopoly claims: (1) a relevant product market consisting of resilient flooring; (2) a relevant product market limited to TINS' and Armstrong's videotapes; and (3) Armstrong's possession of monopoly power in the resilient flooring product market. We take up each of these elements in turn. The parties have stipulated to a relevant geographic market encompassing the United States. J.A. at 652.

1. *Relevant Product Market*

We recently had occasion to set forth the legal contours of a relevant product market in *Tunis Bros. Co. v. Ford Motor Co.*, 952 F.2d 715 (3d Cir. 1991), *cert. denied*, 60 U.S.L.W. 3871 (June 30, 1992). For brevity's sake, we reiterate that definition here:

> The relevant product market is defined as those "commodities reasonably interchangeable by consumers for the same purposes." *United States v. E.I. Du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956); *SmithKline Corp. v. Eli Lilly & Co.*, 575 F. 2d 1056, 1062-63 (3d Cir.), *cert. denied*, 439 U.S. 838 (1978). Factors to be considered include price, use and qualities. *Du Pont de Nemours*, 351 U.S. at 404. Accordingly, the products in a relevant product market would be characterized by a cross-elasticity of demand, in other words, the rise in the price of a good within a relevant product market would tend to create a greater demand for other like goods in that market. *Id.* at 380, 400.

Id. at 722 (parallel citations omitted). Moreover, relevant product submarkets may also exist. *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962). These may be evidenced by "such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." *Id.* With this standard in mind, we turn to the evidence.

a. resilient

As the district court recognized when it left undisturbed the jury's finding of a resilient-only floor covering market, the determination of a relevant product market or

submarket ("market") is a highly factual one best allocated to the trier of fact. *See Weiss v. York Hospital*, 745 F.2d 786, 825 (3d Cir. 1984), *cert. denied*, 470 U.S. 1060 (1985) (determination of the relevant product market is a question of fact). In light of the judgment n.o.v., we review the evidence pertinent to a relevant product market in the light most favorable to TINS, examining whether TINS has produced sufficient evidence that resilient floor covering is not "reasonably interchangeable [with other floor coverings] by consumers for the same purposes." *Id.*

TINS produced clearly sufficient evidence to support the jury's implicit finding that resilient and carpet are, by and large, not considered reasonably interchangeable by consumers. J.A. at 1570-73; 2826. For the most part, residential consumers desire carpeting in bedrooms and resilient in kitchens and baths. Although some areas of the home are subject to interchange-ability, e.g., family rooms and entryways, the differing characteristics of the two floor coverings as they pertain to comfort and maintenance dictate their location in any particular home. *See* The Carpet and Rug Institute, *Economy of Carpet*, J.A. at 8293-94 (describing the lower operating and maintenance costs associated with carpet as opposed to resilient and other hard surface floor coverings). This differentiation is substantiated by evidence that pricing of carpet and of resilient is independent of each other. *See*, *e.g.*, J.A. at 3115 (Pomianoski: Congoleum, another resilient manufacturer, does not take into account carpet prices); J.A. at 2877 (Lerman, a carpet distributor, does not consider resilient prices when pricing carpet; he looks to carpet's competition and profitability). Finally, there was evidence of industry recognition of differences between carpet and resilient and vendor specialization. *See*, *e.g.*, J.A. at 5089 (Crockett, a former Armstrong distributor, testified that the resilient and carpet markets are separate; resilient requires technical installation expertise unlike carpet).

Armstrong contends that even given differences between resilient and carpet, a "soft" floor covering, there simply is no resilient-only relevant product market because

resilient competes with all other hard surface floor coverings.[18] The strongest evidence of a resilient-only product market comes in the form of an Armstrong manual that touts the unique cushioning and spring-back characteristics of resilient as opposed to all other hard surface floor coverings. J.A. at 7784-87. Although less distinct than the preferences governing carpet versus resilient, according to the testimony of David Kolb, president of a carpet distributor, consumer trends generally govern the location of a given floor covering within residences, although there does exist an insignificant amount of crossover due to unusual consumer preference. J.A. at 2193-98; *see also* J.A. at 5957-58 (Armstrong's expert witness, Edwin DePodwin); *cf. Tunis Bros.*, 952 F.2d at 724-26 (plaintiffs' witnesses universally testified to the interchangeability between Ford and other comparably prices tractors). Kolb further testified to industry recognition of the differences in hard surface floorings, opining that floor coverings constitute different product lines that require different marketing strategies. J.A. at 2194.

We conclude that this admittedly mixed record does support the jury's finding of a resilient-only product market.

b. video

Likewise, the record is sufficient to support the jury's finding that the relevant video market or submarket consisted of TINS' video magazine and Armstrong's video selling aids.[19] Armstrong's overall video plans encompassed a ten-year plan to develop a video network, according to Fineman, beginning with Armstrong's distributors in 1983, target its retailers by 1986, and eventually reach consumers through the Fashion Floor Center program. J.A. at 1813; 1846;

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[18] If this proposition were true, Armstrong's possession of a 21% market share in hard surface floor covering products would, as a matter of law, defeat TINS' section 2 claims. J.A. at 5956. *See Domed Stadium Hotel, Inc. v. Holiday Inns, Inc.*, 732 F.2d 480, 489 (5th Cir. 1984).

[19] In so finding, we have combed the substantial trial transcript and concluded that it supports the jury's verdict in this respect. Thus we have not needed to view the actual videotapes and video disks supplied by the parties.

1899-1900; 1924-25. Fineman opined that Armstrong's video network for retailers was only in the planning stages in the fall of 1983 when TINS was launched and lagged three years behind TINS. J.A. at 1899-1900. In order to draw comparisons between the two networks, we will briefly detail Armstrong's video program.

Armstrong announced its first formal videotape program, entitled the "Take Charge" series, in December of 1981. J.A. at 4735. *See, e.g.*, J.A. at 8033; 4735-38. According to the manager of Armstrong's Bureau of Training and Development, Thomas Downey, Armstrong developed the Take Charge series as a training aid to train expeditiously many new Armstrong distributors who were added in response to Armstrong's loss of a large distributor.

Subsequently, in May of 1982, Armstrong announced "The Next Step," a distributor video communication network, with a threefold purpose: 1) to increase the effectiveness of training programs for both distributors and retailers; 2) to improve their ability to market new products and promotions; and 3) to provide an additional communication link within Armstrong's distribution system. J.A. at 7278-79. This program required distributor investment in an industrial grade of Sony betamax equipment capable of "interactive/interruptive" viewing; this system enabled viewers to select from multiple choice options and provided for varying screen responses depending upon the viewer's choice. *Id.*

Armstrong also developed its Fashion Floor Center (FFC) program, which was in place by 1984 and was then available to interested retailers for an investment of $4,000. J.A. at 4452. In exchange for this fee, an FFC participating retailer would receive state of the art product displays, exclusive "high-end" products, management guides and sales training. J.A. at 4450-52. Eventually, the FFC program also included a videodisc kiosk installation for use by consumers to acquaint them with detailed knowledge about Armstrong products and their maintenance. J.A. at 4780. By the time of the trial, the initial FFC fee equalled $8,000. J.A. at 4452.

Armstrong contends that its video network and the TINS magazine do not alone constitute a relevant video product market, primarily because Armstrong's videos were not in magazine form, but were videotaped selling aids indistinguishable from a host of other manufacturers' and commercial selling aid materials. Moreover, Armstrong distinguishes its video program, allegedly tailored toward its distributors, from the TINS magazine, tailored for all retailers. Last, Armstrong posits that its videos were limited in subject matter to Armstrong products and information about Armstrong product features, installation, and general selling techniques whereas the TINS magazine provided a comprehensive survey of the floor covering industry with information about divers and competitive products.[20]

Fineman testified, however, that video magazines targeted at floor covering retailers differed from video magazines produced for other audiences. J.A. at 1962. Moreover, he opined that, with the sole exception that Armstrong's video exclusively focused upon Armstrong products, Armstrong's and TINS' video network were functionally equivalent. J.A. at 1644. Both video programs provided product information and sales techniques. *Id.*

The plaintiffs also refute Armstrong's suggestion that its videos were provided to distributors, explaining that consistent with its entire product distribution scheme, Armstrong channeled sales to retailers through its distributors. Armstrong's Draeger concurred, testifying, "our wholesalers were showing video to retailers." J.A. at 6132; *see also* J.A. at 6140 (the Armstrong video network was designed largely for distributors with portions to be shown to retailers); J.A. at 4886 (Funsten testified that Armstrong made videos available for retailers in

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[20] At trial, Armstrong advanced the theory that its video network did not differ from selling aids provided in different media forms. TINS produced sufficient evidence from which the jury may have reasonably concluded that the video medium was not reasonably interchangeable with print. *See, e.g.*, J.A. at 1633 (Fineman testified that a picture is worth a thousand words); 2917 (Al Wahmon, publisher of *Floor Covering News*, explained that print magazines were "faster breaking" than video magazines).

1983-84); J.A. at 7358-59 (Armstrong memorandum outlining the functions of the FFC program). Draeger even admitted that Armstrong's video would be sold through distributors to retailers. J.A. at 6141.

Thus, the record supports the jury's inference that retailers may have perceived TINS' and Armstrong's video programs to be interchangeable. Both offered product information, sales training and techniques, and interviews with industry experts. Although Armstrong presented evidence of differences between the two video programs, the jury was free to disbelieve Armstrong's evidence.

2. *Monopoly Power in the Resilient Market*

Central to TINS' leveraging theory is the predicate fact of Armstrong's monopoly power in the resilient market. Monopoly power has been defined as "the power to control prices or exclude competition and may ordinarily be inferred from a predominant share of the relevant market." *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956); *see American Tobacco*, 328 U.S. at 797. A predominant share of the market, or a lesser market share combined with other relevant factors, may suffice to demonstrate monopoly power. *Weiss*, 745 F.2d at 827 n.72. Armstrong's market share, if sufficiently high, may obviate the need to analyze other pertinent factors. Thus, our starting point must be to determine Armstrong's market share of the resilient product market. *See Pennsylvania Dental Ass'n v. Medical Serv. Ass'n of PA*, 745 F.2d 248, 260 (3d Cir. 1984) (". . . the size of market share is a primary determinant of whether monopoly power exists"), *cert. denied*, 471 U.S. 1016 (1985).

Although estimates of Armstrong's market share of the resilient market differed widely, taking the evidence in the light most favorable to TINS, the jury could have credited Armstrong with as high a share as 55 percent of the resilient market. J.A. at 2904 (Albert Wahnon, the publisher of industry magazine Floor Covering News, placed Armstrong's market share as high as 55%); *see also* J.A. at 2629 (Fineman testifying that Armstrong possessed over 50% of the resilient market); J.A. at 3330 (Robert Starke, a former Congoleum employee,

placed Armstrong's market share at 50%); J.A. at 1470 (giving Armstrong "dominant market share for sheet goods of 45-50%"). We must determine whether a 55 percent market share, combined with other factors, suffices for monopoly power.

As a matter of law, absent other relevant factors, a 55 percent market share will not prove the existence of monopoly power. *See Domed Stadium Hotel, Inc. v. Holiday Inns, Inc.*, 732 F.2d 480, 489 (5th Cir. 1984) (referring to Judge Learned Hand's formulation that 90% is enough, 60% is not likely to suffice, and 33% is insufficient to constitute monopoly power) (citation omitted). A significantly larger market share than 55 percent has been required to demonstrate *prima facie* monopoly power. *See American Tobacco*, 328 U.S. at 797 ("over two-thirds of the entire domestic field of cigarettes, and . . . over 80% of the field of comparable cigarettes" constituted "a substantial monopoly"); *Grinnell*, 384 U.S. at 571 (87%); *International Boxing Club v. United States*, 358 U.S. 242 (1959) (81%); *see also Eastman Kodak Co. v. Image Technical Services, Inc.*, 112 S.Ct. 2072, 2090 (1992) (100% and 80% to 95% of the relevant markets survives summary judgment).

Reazin v. Blue Cross and Blue Shield, Inc., 899 F.2d 951 (10th Cir.), *cert. denied*, 110 S.Ct. 3241 (1990), upon which TINS relies, does not advance its argument. *Reazin* concerned Blue Cross' decision to terminate its contracting provider agreement with a hospital that had contracted with a competitive insurer, effectively increasing patient costs at the terminated hospital. In *Reazin* the court suggested that given Blue Cross's relative dominance of a 47-62 percent market share as compared to a market share of less than 5 percent for its nearest competitor and given jury findings of actual anticompetitive restraint of trade, a finding of market power may be unnecessary. *Id.* at 968 n.24, 969 (citing *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447 (1986)). *Indiana Fed'n of Dentists* posits two situations in which market power may not need to be demonstrated in order to prove monopoly power: 1) a naked restriction on price or output without a competitive justification; or 2) "proof of actual detrimental effects." *Id.* at

460-61. Neither is implicated in this case, and TINS does not contend otherwise.

Other factors relevant to determining whether Armstrong exercised monopoly power, or "the power to control prices or exclude competition" in the resilient market, include:

> the size and strength of competing firms, freedom of entry into the field, pricing trends and practices in the industry, ability of consumers to substitute comparable goods o[r] services from outside the market, and consumer demand factors. A defendant's power either by itself or aided by these other factors must be enough to restrict entry, supply, or price. *See* L. Sullivan, *Handbook of the Law of Antitrust* §§ 22-32 (1977); *see also* Dolan & Ralston, *supra* note 4, at 767.

Weiss, 745 F.2d at 827 n.72. An evaluation of the evidence pertaining to these other factors is necessary in order to determine whether Armstrong wielded power to control prices or to exclude competition in the resilient market.

TINS produced persuasive evidence in the form of a market share analysis compiled by an Armstrong competitor, Mannington Mills, that Armstrong's market power in 1984 far exceeded that of its nearest three rivals. According to this report, Armstrong then possessed 48% of the resilient market share. J.A. at 7590. Its closest competitors were Congoleum with a market share of 15.2%, Tarkett with 7.8%, and Mannington Mills with 10.9%, respectively; all other competitors shared the remaining 18.1% share of the market. Thus Armstrong's market share exceeded even the combined market share of its three closest competitors and equalled over three times the market share of its nearest competitor. Armstrong, as well as a financial analyst, have described it as the "dominant" manufacturer in the resilient industry. *See, e.g.*, J.A. at 7284-85; 7368. This "dominance" is reflected in Armstrong's superior brand recognition. *See* J.A. at 7368; 1622.

In addition to Armstrong's impressive market share, TINS presented evidence of significant barriers to entry in the resilient industry. A 1984 United States International Trade Commission report on the domestic sheet vinyl flooring industry[21] spelled out several key barriers to entry. *See* J.A. at 7444-50. First, the Commission reported that

> "[p]roducers in the United States and Canada rely primarily on single-supplier distributors (captive suppliers) to sell the major portion of their production. Even without patent protection, this distribution systems [sic] renders quick penetration of the market impossible without purchasing an existing distribution network.

J.A. at 7446. Although Swedish and West German firms have overcome this barrier to enter the United States market, the options for competing in the United States are limited to buying an established distribution network, to developing a new distribution network, or to selling to retail outlets directly at a discounted price for the do-it-yourself market. Buying established networks is difficult because few are available; building one is "a slower method that does not allow an immediate challenge to U.S. producers across the breadth of the market," J.A. at 745;, directing sales to the do-it-yourself market offers limited market penetration because of this group's small size and preference for vinyl tile, rather than vinyl sheeting that is typically sold in 12 foot rolls. *Id.*

Transportation costs, the primary nonproduction cost factor, constitute another formidable barrier to entry by foreign firms, "resulting in an almost universal advantage to the closest . . . producer." J.A. at 7446. The USITC adds, however, that these costs primarily serve to reduce foreign competitors and that

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[21] The resilient industry referred to in this opinion encompasses both sheeting and tile forms of vinyl floor coverings.

> [t]ransportation costs pose an approximately equal disadvantage for U.S. and Canadian producers in most of North America. Also, transportation costs is less a factor in competition between imports from Asia and the domestic product on the west coast, because the ocean freight costs for the imports roughly equal the inland transportation costs from domestic factories on the east coast.

J.A. at 7446.

Assuming arguendo that the record might support an inference of monopoly power in the resilient market we find that TINS has not, however, proven a section 2 leverage claim, because, as we discuss below, (1) there is no evidence of a use of monopoly power in the video market and (2) a showing of an attempt to gain competitive advantage in the video market is insufficient as a matter of law.

B. *Leveraging*

TINS' leveraging claim cannot survive its failure to prove that Armstrong was able to convert power in the resilient market into either a monopoly or a dangerous probability of monopoly in the video market. Moreover, we hold as a matter of law that TINS may not advance a leveraging claim under section 2 premised upon Armstrong's having attained a mere competitive advantage in the relevant video market.

1. *Monopoly Power in The Video Market*

As our starting point, we recognize that TINS need only to have proven the requisite assertion of power in the video market from 1984 through the time of the trial. We agree with the district court that to restrict the time period to 1984 would arbitrarily insulate from antitrust liability a defendant who may have acted prospectively to eliminate a competitor and who may have harbored future plans to overtake a relevant product market. Thus we have combed the extensive trial record in

search of evidence that Armstrong has at any time since 1984 achieved either a monopoly, or dangerous probability of one, in the video market.

Moreover, we also accept the implicit finding of the jury that both TINS' and Armstrong's videos were targeted to floor covering retailers. Because retailers carry various product lines and typically do business with several competing distributors, one cannot characterize the retailer market by extrapolating from data concerning distributors. We reject the district court's conclusion that because Armstrong distributors constituted 15.5 percent of all floor covering distributors or at most 34 percent of the top 50 floor covering distributors, then TINS failed, as a matter of law, to prove a large enough market share in the video market. Rather, the evidence suggests that a 15 to 34 percent share of distributors could have reached a larger portion of retailers, especially given evidence that Armstrong distributors typically deploy larger sales forces than other resilient manufacturers.

Having thus far speculated, we are left without record support to discern precisely how extensively Armstrong has penetrated the video market for retailers. TINS merely explains that Armstrong targeted all retailers and that no replacement video magazine for TINS has emerged. There is no evidence to show how many retailers Armstrong has actually brought into its video network, or, alternatively, how many retailers sell Armstrong products and thus would be viable prospects to join Armstrong's video network.

Moreover, even if Armstrong remains the only supplier in the relevant video market, the record clearly proves that barriers to entry in the video market are extremely low. In fact, upon TINS' demise, two Armstrong distributors produced their own substitute video magazine to satisfy their retailers' full year subscription. J.A. at 4227. They funnelled relatively little capital into the venture and needed minimal start-up time. *See* J.A. at 4227-29. Fineman's own plans to create a video network for the sports industry, as well as his contemplation of developing similar technology in additional markets, demonstrate the fallacy of Fineman's testimony that expertise in the particular industry constituted a barrier to entry; even if legally

tenable, Fineman conceded he lacked any expertise in the sporting goods industry, thus factually defeating this contention. J.A. at 1800-01; *see* J.A. at 8408 (reserving contract rights with RCA to obtain discounted video equipment for ventures in the sporting goods, liquor, apparel and beauty aides industries).[22] The evidence falls short of demonstrating that Armstrong has at any time since 1984 captured monopoly power, or a dangerous probability of it, in the video market.

2. *Competitive Advantage in the Video Market*

TINS alternatively posits that a monopoly leveraging case may be proved by showing only a "competitive advantage" in the secondary market. Thus, assuming *arguendo* that it has proven that Armstrong flexed monopoly power over resilient, TINS suggests that it may prevail upon its section 2 claim even in the absence of proof that Armstrong acquired anything more than a "competitive advantage" in the video market. TINS derives this theory from *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 276 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980), in which the court of appeals stated that "the use of monopoly power attained in one market to gain a competitive advantage in another is a violation of section 2, even if there has not been an attempt to monopolize the second market." Although monopoly leveraging claims are not entirely foreign to us, *see Danny Kresky Enterprises, Corp. v. Magid*, 716 F.2d 206 (3d Cir. 1983); *SmithKline Corp. v. Eli Lilly & Co.*, 575 F.2d 1065 (3d Cir.), *cert. denied*, 439 U.S. 838 (1978), we have not previously considered the viability of

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[22] TINS alluded to evidence that Hal Clark's supermarket industry video magazine start-up costs of $1.5 million proved a formidable barrier to entry. By Clark's own testimony, however, his "Supermarket Insights" differed significantly from TINS or Armstrong's videos. Clark's was gratuitously provided to a limited number of top industry executives and financed through paid advertising. TINS' revenue came from entirely different sources, *i.e.*, subscribers, and its target audience was widely-based.

Berkey Photo's holding; we are now asked to do just that.[23] *Berkey Photo* has not been widely approved and has been adopted only by the Court of Appeals for the Sixth Circuit. *See Kerasotes Michigan Theaters, Inc. v. National Amusements, Inc.*, 854 F.2d 135 (6th Cir. 1988) (adopting *Berkey Photo*'s leverage theory in reversing the dismissal of a complaint for failure to state a claim).

In *Berkey Photo*, the plaintiff alleged that the defendant, Kodak, had leveraged its monopoly power in the camera and film markets to obtain a "competitive advantage" in the photofinishing equipment and services markets, which Kodak concededly did not pose any danger of monopolizing. 603 F.2d at 275. Monopoly power is tolerated under antitrust law only to the extent that it provides competitive incentives to a firm innocently possessing such power. Moreover, because it did not perceive any reason to distinguish between the destruction and the distortion of competition in the leveraged market, the court held that Kodak could be liable even if it exercised less than monopoly power, or even a dangerous probability of monopoly, in the downstream photofinishing market. *Id.* "[A] firm violates section 2 by using its monopoly power in one market to gain a competitive advantage in another, albeit without an attempt to monopolize the second market." *Id.*

Rather than focusing upon broad premises of antitrust law, we begin with the text of the Sherman Act.[24] Two important distinctions between section 1 and section 2 of the Sherman Act surface upon examination of the language.

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[23] *Danny Kresky* involved the use of monopoly leveraging in one city to exclude a competitor from promoting concerts in another. *SmithKline* involved monopoly leveraging over sales of antibiotics to set prices in the cephalosporin drug market for cephalosporin drugs at a level at which competitors in the leveraged market could not compete. Because the plaintiffs had proven conduct traditionally proscribed by the Sherman Act, neither case implicated the issue with which we are faced.

[24] Section 1 proclaims that "[e]very contract, combination . . ., or conspiracy, in restraint of trade . . . is . . . illegal." Section 2 declares as illegal "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize . . . ." 15 U.S.C.A. §§ 1, 2 (West Supp. 1992).

Section 1 prohibits "restraints of trade" accomplished by means of concerted action; section 2 prohibits more severe monopoly and attempted monopoly resulting from unilateral action. As these distinctions make clear, the Sherman Act does not make unlawful the entire universe of anti-competitive conduct. It does not prescribe anti-competitive unilateral conduct that falls shy of threatened monopolization.

This was succinctly set forth by the Supreme Court in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), in which the Court held that a wholly-owned subsidiary and its parent corporation could not engage in concerted action in violation of section 1 as a matter of law:

> It cannot be denied that section 1's focus on concerted behavior leaves a "gap" in the Act's prescription against unreasonable restraints of trade. An unreasonable restraint of trade may be effected not only by two independent firms acting in concert; a single firm may restrain trade to precisely the same extent if it alone possesses the combined market power of those same two firms. *Because the Sherman Act does not prohibit unreasonable restraints of trade as such* -- but only restrains effected by a contract, combination, or conspiracy -- *it leaves untouched a single firm's anti-competitive conduct (short of threatened monopolization)* that may be indistinguishable in economic effect from the conduct of two firms subject to section 1 liability . . . .

Id. at 774. *Berkey Photo*'s formulation of monopoly leveraging to proscribe unilateral restraints of trade does violence to the text of the Sherman Act and decimates this "gap" in liability.

For its holding, the court in *Berkey Photo* relied upon dicta in *United States v. Griffith*, 334 U.S. 100 (1948). In *Griffith*, the Court broadly stated that ". . . the use of monopoly

power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful." In *Griffith*, a monopoly leveraging case, the Court considered whether concerted action by several movie theater operators, who owned the only theaters in numerous "closed towns," to enter into annual "master agreements" with movie distributors that resulted in restricting the number of films available to competing movie theaters in neighboring "open towns" constituted violations of sections 1 and 2 of the Sherman Act. *Griffith*, 334 U.S. at 102-03. The district court had granted summary judgment for the defendants because it believed that the evidence did not demonstrate a conspiracy in restraint of trade. Finding a pooling of buying power with anti-competitive effects, the Court reversed the district court, explaining that "even if we accept the District Court's findings that appellees had no intent or purpose unreasonably to restrain trade or to monopolize, we are left with the question whether a necessary and direct result of the master agreements was the restraining or monopolizing of trade within the meaning of the Sherman Act." *Id.* at 106. On remand, the district court was instructed to determine the effect of these practices, a conclusion it had not reached given its previous holding. *Griffith* did not reach the question of whether the several movie theater operators had leveraged their power in one market in order to gain a simple competitive advantage in another. Nor did *Griffith* determine whether that action would be unlawful. Thus, *Griffith*'s broad statement, upon which *Berkey Photo* relied, should not control this case. This is especially true since, in contrast to the court in *Berkey Photo*, we have the benefit of *Copperweld*'s explication of the Sherman Act's purposeful "gap" in liability.

The Court of Appeals for the Ninth Circuit has, likewise, expressly declined to follow *Berkey Photo*. *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536 (9th Cir. 1991), *cert. denied*, 112 S.Ct. 1603 (1992). In rejecting *Berkey Photo*'s monopoly leveraging theory, the court gave weight to *Copperweld*'s distinction between section 1 and section 2 claims, concluding that *Berkey Photo*'s theory derived from a misapplication of the elements of a section 2 claim.

In concert with the Court of Appeals for the Ninth Circuit, we hold that in order to prevail upon a theory of monopoly leveraging, a plaintiff must prove threatened or actual monopoly in the leveraged market. We therefore reject TINS' proposition that it needed to prove only a competitive advantage in the relevant video market.

V. *New Trial*

Having concluded that the district court's grant of judgment n.o.v. must be reversed in part, we now consider the district court's conditional grant of a new trial on the Sherman Act section 2 claim and the tortious interference claims.[25] *See* Fed. R. Civ. P. 50(c)(1). The district court granted a new trial on two grounds: (1) the verdict was against the weight of the evidence, and (2) improper conduct by plaintiffs' trial counsel so pervaded the trial as to infect the jury's verdict. We review each of these rulings for an abuse of discretion. We discuss them in reverse order.

A. *Conduct of Counsel*

The district court granted a conditional motion for a new trial premised upon its finding of improper conduct by plaintiffs' counsel during summation. In short, the district court found that the tenor of the summation was such that a strong probability existed that the verdict had been influenced by the improper conduct. In its judgment, the cautionary instructions given to the jury proved to be insufficient to immunize the jury from the improper and inflammatory remarks of plaintiffs' counsel. *Fineman*, 774 F. Supp. at 269. In brief, the district court concluded that, among other infractions which do not bear repeating here, *see Fineman*, 774 F. Supp. at 274-75, plaintiffs' trial counsel had improperly testified to his own truthfulness and trustworthiness, supplied "facts" not in evidence about the credibility of Armstrong witnesses, accused Armstrong's

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[25] We note that because of our disposition of the Sherman Act section 2 claim on appeal, *see supra* Part IV, a new trial on remand would not include a section 2 claim. A new trial would, however, include a Sherman Act section 1 claim and a contract claim, discussed *infra* Part VI.

witnesses of being "liars" and "perjurers," and levied "an unadorned, disparaging attack" upon defense counsel throughout his summation. *Fineman*, 774 F. Supp. at 270-72. This basis for a new trial has been adequately preserved.[26]

Our standard of review with respect to the award of a new trial for prejudicial conduct by counsel is deferential. "We recognize that the trial judge has considerable discretion in determining whether conduct by counsel is so prejudicial as to require a new trial." *Draper v. Airco, Inc.*, 580 F.2d 91, 94 (3d Cir. 1978) (citations omitted). Because the trial judge was present and able to judge the impact of counsel's remarks, we defer to his assessment of the prejudicial impact. As we stated in *Reed v. Philadelphia, Bethlehem & New England R.R. Co.*, 939 F.2d 128 (3d Cir. 1991), "[i]n matters of trial procedure such as that involved here, the trial judge is entrusted with wide discretion because he is in a far better position than we to appraise the effect of the improper argument of counsel." *Reed*, 939 F.2d at 133. Thus we will defer to the district court's judgment that its curative instructions during the summation were insufficient to expunge the prejudicial impact of plaintiffs' trial counsel's closing remarks. J.A. at 6988.

In order for us to evaluate the plaintiffs' trial counsel's summation in context, a brief review of Armstrong's counsel's summation is useful. Armstrong had counterclaimed against TINS and Fineman, alleging a civil conspiracy to bring this lawsuit, and requesting as damages legal fees amounting to $1.1 million. In commencing his closing argument, Armstrong's counsel characterized Armstrong as the true victim

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[26] Armstrong objected to plaintiffs' trial counsel's improper remarks by filing a motion *in limine* to limit his closing argument, moving for a restraining order, placing several objections on the record during his summation and moving for a mistrial following summation. J.A. at 6988; 7154; 7158-59; 7206. Although Armstrong's counsel did not object to each potentially improper remark, the district court concluded that it had adequately preserved its objections. J.A. at 229. The district court did not abuse its discretion in ruling that Armstrong was not required to object to each and every objectionable remark because requiring such action would have unnecessarily created even more prejudice to Armstrong in the eyes of the jury.

in this case, stating: "Armstrong is a million dollar victim because we did nothing wrong," and characterizing the case as a "financial million dollar nightmare for Armstrong." J.A. at 6884; 6880. Subsequently, he uttered "I believe . . .", inviting a mild correction from the district court. J.A. at 6891. The balance of his summation focused upon the credibility of witnesses; he accused Fineman of lying and urged the jury to disbelieve the plaintiffs' theory of plot and conspiracy and to credit Armstrong's witnesses. J.A. at 6977; 6971-83. With this background laid, we turn to evaluate plaintiffs' trial counsel's remarks to the jury in light of our jurisprudence.

At the outset, we recognize that not all improper remarks will engender sufficient prejudice to mandate the granting of a new trial. Our test is whether the improper assertions have made it "reasonably probable" that the verdict was influenced by prejudicial statements. *Draper*, 580 F.2d at 97. Often, as in the seminal case of *Draper*, a combination of improper remarks are required to persuade us of prejudicial impact. There we held that the combination of the following improprieties by plaintiff's counsel constituted grounds for a new trial:

> 1) he attempted to prejudice the jurors through repeated inappropriate references to the defendants' wealth; 2) he asserted his personal opinion of the justness of his client's cause; 3) he prejudicially referred to facts not in evidence; and 4) without provocation or basis in fact, he made several prejudicial, vituperative and insulting references to opposing counsel.

580 F.2d at 95; *cf. Salas v. Wang*, 846 F.2d 897 (3d Cir. 1988) (an isolated improper remark will not support the grant of a new trial); *Anastasio v. Schering Corp.*, 838 F.2d 701 (3d Cir. 1988) (same). Despite a curative instruction, which came a day after the offending summation, we concluded in *Draper* that "it was more than 'reasonably probable' that the verdict was influenced by the prejudicial statements." *Id.* at 97. This conclusion was compelled by the argument as a whole rather than a single instance or type of impropriety. *Id.*

In addition to our caselaw, the district court applied New Jersey Rule of Professional Conduct 3.4(e) which prescribes "Fairness to Opposing Party and Counsel" by prohibiting certain conduct:

> A lawyer shall not: . . . (e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused.

Rule of Professional Conduct 3.4(e); D.N.J. R. 6. As will be demonstrated, upon this record, we cannot second guess the district court's judgment that plaintiffs' trial counsel ran afoul of both the rule and our jurisprudence.

Plaintiffs' trial counsel commenced his summation on the day following Armstrong's counsel's summation:

> One thing [defense counsel] and I agree on, probably the only thing, is that credibility will decide this case, who's telling the truth.
>
> If you believe [defense counsel's] telling the truth, then the plaintiff's [sic] don't deserve a penny.
>
> If you believe we're telling the truth then I will show that the evidence justifies an award . . .
>
> How are you going to determine who's telling the truth? Well, *it seems to me that you have to start with lawyers because let's face it, [defense counsel] made a couple of very direct statements*

> *yesterday. You have to judge whether he was being truthful to you or whether he wasn't.*
>
> Now, last night I counted up, in going through his statements that he wanted you to believe, over 24 misrepresentations and I have backed them up with fact.

J.A. at 6987-88 (emphasis added). He expounded upon the first of his 24 "misrepresentations"[27] at which point defense counsel

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[27] These "misrepresentations" consisted of Armstrong's version of disputed material facts. A demonstrative aid shown to the jury listed "[Defense Counsel's] Significant Misrepresentations In Summation." J.A. at 1296-1303. These "misrepresentations" attributed to Armstrong and "facts" attributed to plaintiffs merely consisted of two versions of disputed factual issues. A brief excerpt demonstrates:

MISREPRESENTATION	*FACTS*
12. Donofrio said that there was a continuing problem with the quality of the June issue in the eyes of the Stern's sales staff.	12. By end of the day Friday the sales staff was fully in favor of going forward.
14. Sterns was scheduled to go out on Monday after the sales training.	14. Sterns admits that no advance appointments were made.
15. Parties do not compete.	15. Armstrong's own documents show that they viewed TINS as competitor.
18. Armstrong has never sold a single subscription to Armstrong's Video Network.	18. Floor Fashion Center sells for $8,000 to buy in and ongoing $1,000 per year includes Armstrong Video Network.
22. TINS and Armstrong were not competitors.	22. Armstrong's own documents reveal that Armstrong considered

objected and the district court cautioned the jury that "the lawyers in the case are not witnesses. The credibility of the lawyers is not an issue in this case as opposed to the credibility of the witnesses." J.A. at 6987-88.

In the course of describing the 24 misrepresentations that the defense counsel allegedly made, which served as plaintiffs' trial counsel's outlining theme, plaintiffs' counsel suggested that defense counsel either forgot or deliberately misrepresented the evidence. *See, e.g.*, J.A. at 6993 ("[Defense counsel] got up here with a straight face and he said that to you, hoping that you would believe him"). Plaintiffs' trial counsel also provided the jury with a possible motive for defense counsel's alleged misrepresentations -- $1.1 million in legal fees, J.A. at 6993, and hammered home this theme repeatedly:

> Well, [defense counsel] has earned his million dollars, I couldn't do it, I really couldn't.

TINS to be a prime competitor.

See, for example, Csnrko 10/25/83 memo ("competitive effort").

See Guzinsky 9/25/83 memo ("TINS conflicts with future video plans").

See Roth testimony ("considered TINS to 'overlap' with Armstrong Video Network").

24. Contends Armstrong's market share is only 25-30%.

24. Mannington chart shows Armstrong market share as 49%.

J.A. at 1296-1303.

J.A. at 7024.

> [Defense counsel] has earned his million dollars. I give it to him. He has earned it. He has earned his million dollars. Let it not be said that he did not earn it."

J.A. at 7059.

> . . . and this poor [defense counsel], I hope he's already gotten his million dollars, I hope the check has already been deposited.

J.A. at 7062.

It has long been a rule of this court that vituperative references to opposing counsel will not be tolerated. In *Draper*, 580 F.2d at 91, we so held in a case that involved plaintiff's counsel's repeated characterization of defense counsel and defendants collectively as "his" or "this" "gang," "charge[ing]" defense counsel "as part of the same conspiracy," and implying that defendants and their counsel had withheld documents: "every time we get to a crucial spot, things disappear." *Id.* at 96. These repeated assertions in combination with other improprieties made it "reasonably probable" that the verdict was influenced by the prejudicial statements. *Id.* at 96-97. The improprieties apparent on the cold appellate record in *Draper* were sufficiently egregious to require reversal of the district court's denial of a new trial even under our deferential standard of review. The district court's assessment that plaintiffs' trial counsel exceeded the bounds of propriety established in *Draper* falls with its sound exercise of discretion.

Furthermore, the district court found that plaintiffs' trial counsel also improperly provided his personal opinion as to the justness of his cause and injected his own credibility as an issue in the case:

> I have a certain calmness about me today because of you, that is because I trust you. I have come to know you over

> almost three months and I think I know what type of people you are and I know, I don't think, I don't hope, but I just know that you're going to do the right thing.
>
> * * *
>
> I could show you all the documents . . . [o]r, I said to myself, hopefully, by now after three months you trust me enough that if I tell you something that I've not lied to you yet, that I'm not about to start now. And I thought I could shorten it up a great deal on the hope that you will trust me, . . . you will trust me enough that I will be straight with you. . . . that's one of the reasons why yesterday I spent a lot of time on the credibility of the people who were talking up here, myself and [defense counsel].

J.A. at 7085-87; *see also* J.A. at 7097. He also pledged his own truthfulness:

> I mean, after all, as the Judge told you and the Judge is absolutely right, it's not just so much the truthfulness of the lawyers, although I might remind you, if I may, that when I got up here a few months ago, *I told you I would never lie to you. [Defense counsel] couldn't point out a single misrepresentation that I made to you over the three months because I didn't make one. That's not how I try cases.*

J.A. at 7015 (emphasis added). And further:

> I said to you [at the onset of the trial], I make a pledge that I will not lie to you

> and I will prove everything on this [demonstrative aid] board.

J.A. at 7148.

Plaintiffs' trial counsel's comments were not limited to Armstrong's counsel. When arguing the relative credibility of the witnesses, he repeatedly made a number of impassioned remarks. He spoke in terms of "the nerve," J.A. at 7034; 7040; 7044; 7050; 7058, of Armstrong witnesses to lie on the stand or perjure themselves "with a straight face," J.A at 7037; 7040, opining that he couldn't say it "with a straight face"; "in front of a federal judge and a federal jury," J.A. at 7034; 7038; 7050; 7058; 7139. He argued that the testimony of Armstrong's witnesses and its theory of the case was simply "insulting" to the intelligence of the jury, J.A. at 7039; 7047; 7048; 7057, and opined that Armstrong witnesses must have mistaken the jurors for people "just off the boat". J.A. at 7050.[28] Although we recognize that "advocacy" need not "be devoid of passion," in context we are satisfied that the district court did not err in ruling that these remarks crossed the line dividing line proper from improper conduct. *See Draper*, 580 F.2d at 95.

The plaintiffs assert that their trial counsel's summation in this regard was no stronger than that warranted by

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[28] One quote neatly capsulizes plaintiffs' trial counsel's summation in these respects. After recreating a question put to Armstrong witness Dennis Draeger concerning whether Roth's comments to Abrahamson "[weren't] just a blatant, blatant, blatant disregard of what you were supposed to do?", he argued,

> And God bless him, please, in front of a federal judge and I ask him that question. He's in front of a federal jury and he's got the nerve to say, no, it's not inconsistent.
>
> God bless him. He's got a lot of nerve. Can you imagine he's looking you in the eye?
>
> I mean, does he think you just got off the boat? Who does he think he is? Really. That is insulting.

J.A. at 7050.

the evidence of conspiracy between Armstrong's witnesses and counsel. They suggest that *Anastasio*, 838 F.2d at 701, stands for the proposition that a new trial is not warranted on the basis of counsel's questioning the credibility of a witness. In striking contrast to this case, however, our holding in *Anastasio* rested upon the fact that the trial counsel's improper statement was an isolated one in an otherwise proper summation. *Id.* at 706. This fact, combined with the district court's curative instruction to the jury that the statements of counsel are not evidence, was sufficient to ensure that no prejudicial impact had occurred. *Id.*; *see also Salas*, 846 F.2d at 907-910 (one impassioned comment in a highly emotionally charged trial was insufficient to prejudicially affect the defendant's substantial rights).

The district court also found that plaintiffs' trial counsel had made statements that arguably referred to extrinsic evidence. *Fineman*, 774 F. Supp. at 270. For example, he stated: "I have more on Mr. Draeger, but I won't bore you with it. I hope by now you trust me that there's plenty more in here, but I'm not going to bore you with it." J.A. at 7051; *see also* J.A. at 7097. Although the plaintiffs contend that the statement was made in the context of summarizing the evidence and that plaintiffs' trial counsel was referring to record evidence, the district court found without elaborating that counsel had relied on facts outside the record. *Fineman*, 774 F. Supp. at 270. As we made clear in *Ayoub v. Spencer*, argument injecting prejudicial extraneous evidence constitutes reversible error. 550 F.2d 164 (3d Cir.), *cert. denied*, 432 U.S. 907 (1977).[29]

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[29] In *Ayoub*, a personal injury case, we considered defense counsel's representation that the plaintiff's testimony was inconsistent with his medical history as contained in two sets of hospital records. One set of records was not submitted into evidence, although a doctor testified that in practice a medical history was based upon the patient's description. Thus, the effect of counsel's remark was to insinuate that Ayoub had given inconsistent statements about his medical condition. We ruled that "[r]eversible error is committed when counsel's closing argument to the jury introduces extraneous matter which has a reasonable probability of influencing the verdict." *Id.* at 170; *see also Draper*, 580 F.2d at 96 (in a wrongful death action, it was improper for plaintiff's counsel to speak of meeting with the decedent's children, who did not testify, and use that as an improper springboard to speculate as to the decedent's motivation for attempting the dangerous, and

B. *Weight of the Evidence*

With respect to the court's ruling that the verdict was against the weight of the evidence, we caution that the district court ought only to grant a new trial on this basis where "a miscarriage of justice would result if the verdict were to stand." *Williamson v. Consolidated Rail Corp.*, 926 F.2d 1344, 1352 (3d Cir. 1991). This limit upon the district court's power to grant a new trial seeks to ensure that a district court does not substitute its "judgment of the facts and the credibility of the witnesses for that of the jury." *Lind v. Schenley Indus. Inc.*, 278 F.2d 79, 90 (3d Cir.) (*in banc*), *cert. denied*, 364 U.S. 835 (1960). "Such an action effects a denigration of the jury system and to the extent that new trials are granted the judge takes over, if he does not usurp, the prime function of the jury as the trier of facts. It then becomes the duty of the appellate tribunal to exercise a closer degree of scrutiny and supervision than is the case where a new trial is granted because of some undesirable or pernicious influence obtruding into the trial." *Id.*

Nevertheless, reversal of a judgment n.o.v. upon a finding of sufficient evidence to support the jury's verdict does not preclude affirmance of a new trial order arising from the conclusion that the verdict is against the weight of the evidence. *See, e.g.*, *Roebuck v. Drexel University*, 852 F.2d 715, 735 (3d Cir. 1988); *American Bearing Co. v. Litton Indus.*, 729 F.2d 943, 948 n.11 (3d Cir.), *cert. denied*, 469 U.S. 854 (1984). In *Roebuck*, we mandated just such a result, acknowledging that the evidence permitted a number of inferences which supported the plaintiff's cause of action but also recognizing that the weight of the evidence fell the other way. The comment we made in this regard is equally applicable here:

> We must also acknowledge the extraordinary number of inferences that the jury must have drawn in order to

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ultimately fatal, job). Even the district court's instruction, that the jury would have to "recall the testimony about [the missing set of hospital records]" did not suffice to cure the prejudice. *Ayoub*, 550 F.2d at 170 & n.10.

> reach the verdict that it did. Although we believe that each of the inferences that we have discussed are individually logically sound, we recognize that at some point too many inferences become mere speculation; this verdict plainly comes very close to that line.

Roebuck, 852 F.2d at 736. When reviewed as a whole, even in the light most favorable to the nonmoving party, the record in this case as well allows for the inferences on which the plaintiffs rest their case. Nonetheless, we cannot find that the district court abused its discretion in concluding that the verdict was clearly against the weight of the evidence in view of the inferences the jury must have made despite contrary direct evidence, and especially in view of the district court's finding that plaintiffs' trial counsel advanced prejudicially improper arguments to the jury throughout the trial, culminating in a particularly offensive summation.

Given the wealth of questionable remarks made by plaintiffs' trial counsel and the highly inferential case, we are clearly convinced that the district court did not abuse its discretion in awarding Armstrong a new trial.

VI. *Directed Verdict and Summary Judgment Order*

Because we will remand this case to the district court for a new trial on TINS' tortious interference claim, we now address two other dispositive orders of the district court: the directed verdict on TINS' section 1 claim and the summary judgment on its breach of contract claim.

A. *TINS' Sherman Act Section 1 Claim*

Section 1 of the Sherman Act prohibits "[e]very contract, combination . . ., or conspiracy in restraint of trade or [interstate] commerce. . . " 15 U.S.C. §1 (1982). A judicial gloss of reasonableness has been cast over section 1; to be actionable, a restraint of trade must be unreasonable. *See Business Electronics*, 485 U.S. at 723. A section 1 claim thus requires proof of two elements: concerted action and an

unreasonable restraint of trade. Only the first element concerns us here.

We have variously formulated the meeting of minds requisite to an antitrust conspiracy.

> The propriety of the directed verdict thus turns on whether, with regard to [Armstrong and Stern], ". . . the circumstances are such as to warrant [the trier of fact] in finding that the [alleged] conspirators had a unity of purpose or a common design and understanding or a meeting of minds in an unlawful arrangement.

Columbia Metal Culvert Co. v. Kaiser Aluminum & Chem. Corp., 579 F.2d 20, 33 (3d Cir.), *cert. denied*, 439 U.S. 876 (1978) (citations omitted). We have described the concerted action element of a section 1 claim as requiring proof of a "conscious commitment to a common scheme designed to achieve an unlawful objective." *Edward J. Sweeney*, 637 F.2d at 111. TINS has here alleged that Armstrong and Stern conspired to destroy TINS' competitive threat to Armstrong in the relevant video market.

At the close of the plaintiffs' case, the district court orally granted a directed verdict to Armstrong on TINS' section 1 claim, determining that "under no set of circumstances based on this record could the jury reasonably find that Stern shared Armstrong's purpose of eliminating TINS from competition in the video magazine market." J.A. at 3680. In so ruling, the district court rejected TINS' proposition that section 1 co-conspirators are held liable for their joint commitment to an unlawful purpose whether or not their motives for making that commitment are different. We conclude that the district court's novel approach is misplaced as it renders section 1 claims unavailable to private litigants suffering antitrust injury as a result of concerted action in a vertical matrix. Such a restrictive rule fails to recognize the difference between motive and objective and would dramatically alter the antitrust landscape in a manner unjustified by either precedent or policy

considerations. As we set forth in *Edward J. Sweeney*, 637 F.2d at 111, the emphasis is upon the participant's "*commitment to [the] scheme* [which is] designed to achieve an unlawful purpose" (emphasis added) which is crucial. A rational factfinder could infer agreement with the objective from knowledge of the objective and action calculated to achieve the objective despite differing motives.

At the outset, it is critical to recognize that the conspirators *sub judice* are vertically aligned; their conspiracy consists of pressure brought by a manufacturer upon its distributor to aid it in driving a competitor out of business. In a typical vertical context, an alleged competitor to the manufacturer will not be perceived in the same light by the manufacturer's downstream distributor. Rather, any interest that a distributor might harbor in eliminating this competitor from the market would be derivative of its manufacturer. As demonstrated by this case, TINS did not pose a direct competitive threat to Stern; Stern lacked any independent motive to drive TINS from the relevant video market. Because Stern relied upon sales of Armstrong products for 90 percent of its gross revenues, however, it would naturally perceive that that which is in Armstrong's interest also inures to Stern's benefit. Stern's only possible motivation for destroying TINS would necessarily be derivative of Armstrong's desire to eliminate its competition. In this factual finding upon the record evidence, the district court was not clearly erroneous.[30]

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[30] Armstrong primarily reiterates an insufficiency of the evidence challenge to TINS' theory of conspiracy. If this were borne out by the record, then Armstrong's evidence that Stern acted independently and in accordance with its own business interests would prevail to defeat any conspiracy motive or theory. However, for the reasons provided above in Part III, we reject Armstrong's formulation of the reasonable inferences that may be garnered from the trial record.

TINS' proposition that distributing the TINS magazine would have been highly profitable to Stern by enabling Stern to supplement its income with subscription royalties is amply supported in the record as is the inference of motivation on Stern's part to enter the conspiracy, namely, Stern's heavy reliance upon Armstrong as the supplier of 90% of its product. In addition, TINS produced evidence to show that Stern was not achieving a desired level of profitability and Armstrong had encumbered Stern with inventory liens.

The parties have not suggested nor have we been able to find any authority for the proposition that vertically aligned co-conspirators must share an identical anticompetitive motive. Moreover, we cannot conceive of a situation in which vertically aligned co-conspirators seeking to destroy a competitor of only one could ever satisfy this requirement. We note that the Supreme Court has not carved out from section 1 liability a conspiracy to destroy a competitor by two firms at different levels of distribution. Although the Court has had more occasions to address *per se* price-fixing illegality in a section 1 context, *see, e.g., Albrecht v. Herald Co.*, 390 U.S. 145 (1968) (a vertical maximum price-fixing scheme is *per se* unlawful under section 1); *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 339 (1990) (same but requiring that plaintiff demonstrate antitrust injury to prevail); the same principle applies to vertical section 1 claims grounded in non-price restraints. *See, e.g., Business Electronics*, 485 U.S. at 724 (recognizing the viability of section 1 claims for vertical nonprice restraints under a rule of reason test).

Likewise, we have not required previously an exact sharing of the anticompetitive motive for concerted action. *Harold Friedman, Inc. v. Thorofare Markets, Inc.*, 587 F.2d 127, 143 n.64 (3d Cir. 1978) ("Although there is no direct evidence that Union shared Thorofare's motive of eliminating a competitor, Union cannot automatically be absolved from liability on this ground, particularly since it might well have known of Thorofare's purpose and 'materially aided in the accomplishment of [its] plan'"). In *Harold Friedman, Inc. v. Kroger Co.*, 581 F.2d 1068 (3d Cir. 1978), we explained in some detail the contours of the factors provided by the Supreme Court in *Albrecht*, a vertical price-fixing case, for determining concerted action:

> First, both Milne and Kroner knew that the Herald's purpose was to assure its

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Although Armstrong vigorously contested the existence of, or permissible interpretation of, each of these alleged facts, because we may not tread on the jury's credibility determination function, we must presume in reviewing this directed verdict that the jury would believe TINS' factual contentions.

> fixed price for the retail sale of the papers. Therefore, knowledge of the defendant's purpose to restrain trade is an important factor. Secondly, at least two members of the combination stood to benefit by the restraint of trade, the Herald by assuring the price it desired and Kroner by getting a profitable paper route. Thus, in a sense, two members of the combination shared a common purpose insofar as they both benefitted from the restraint of trade.
>
> A final important factor in *Albrecht* is that the agreement with Kroner was in no sense collateral to the purpose to restrain trade but went to the heart of the restraint.

Harold Friedman v. Kroger, 581 F.2d at 1073.

Viewing the facts in the light most favorable to the plaintiffs as non-moving parties, we find that these factors were established in this case. Although the inference is broad, Roth's "overlap" statement, *see supra* at 45,[31] could have been understood to demonstrate that Abrahamson recognized a conflict between Armstrong's and TINS' videotapes and recognized Armstrong's anticompetitive goal. Second, Armstrong clearly benefitted from eliminating TINS' competition in the video market and Stern benefitted from appeasing the supplier upon whom it was so dependent. Third, given the evidence that Armstrong executives knew of TINS' precarious financial position, the agreement between Armstrong and Stern would have been central to the demise of TINS. Thus we conclude that a rational factfinder could draw the inference that Armstrong wanted to eliminate TINS from the video market so that Armstrong would not have to compete with TINS, and that Stern knowingly aided in that effort, albeit from somewhat

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[31] Roth had testified that he perceived TINS would "overlap" with Armstrong's video program and "probably" had counseled Abrahamson that distributing TINS would not make "a lot of sense."

different motives. It is not likely that Stern believed that it was the only distributor Armstrong did not wish TINS to deal with; and a jury could find that Stern is chargeable with knowledge that if Armstrong succeeded, TINS would indeed be eliminated as a competitor in that market.

The district court erroneously relied upon *Columbia Metal Culvert* to hold that antitrust co-conspirators must share a common anticompetitive motive. *Columbia Metal Culvert*, in which a distributor brought suit under sections 1 and 2 of the Sherman Act against its former suppliers and one of its former employees for conspiring to destroy its business, differs from the case before us in a number of salient respects.

First, in obvious contrast to Stern's role, the role of the former employee, Kennedy, was limited to leaving Columbia's employ to open a business in competition with Columbia. Although Kennedy and the supplier met on several occasions to discuss Kennedy's future plans, Kennedy's relationship with the supplier did not give rise to a reasonable inference that Kennedy was aware of his co-defendant's strategy and had knowingly associated himself with it. "[T]he record [was] devoid of evidence that Kennedy was privy to [the supplier's] broader machinations . . . [or] knew that the probable effect of [the supplier's] actions would be to eliminate Columbia." *Columbia Metal Culvert*, 579 F.2d at 36.

Further, and in striking contrast to the instant case, the evidence was not susceptible of an inference that Kennedy conspired with the supplier because Kennedy acted to his own economic advantage; he had thoroughly substantiated his financial need to seek a more remunerative employment. Had Kennedy acted in an economically disadvantageous manner, a factfinder could infer an anticompetitive motive instigated by a persuasive or coercive co-conspirator.[32] Moreover, while not

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[32] Armstrong inexplicably cites to a conscious parallelism case, *Venzie Corp. v. United States Mineral Prod. Co., Inc.*, 521 F.2d 1309, 1314 (3d Cir. 1975), for the proposition that our precedent requires that "proof of an antitrust conspiracy must include the 'satisfactory demonstration of a motivation to enter an agreement' reflecting the conspiracy." Appellee's Brief at 53. In order to find evidence of concerted action in a parallel refusal

explicitly stated, it is clear that when negotiating with the supplier Kennedy had not yet assumed a dependent position with respect to the supplier, investing the supplier with potentially coercive influence over Kennedy. Therefore, in *Columbia Metal Culvert*, we ruled that there was "insufficient evidence from which a jury could find a 'unity of purpose, design or understanding' between Kennedy and the other defendants". *Id.* at 36.

Our conclusion that a conspiracy in violation of section 1 does not require the sharing of an identical anticompetitive motive is also supported by distinguished commentators. Examining vertical conspiracies, one respected scholar, Phillip Areeda, distinguishes cases in which the two alleged co-conspirators are both named defendants (*i.e.*, *Columbia Metal Culvert*) from those in which only one is named a defendant (*i.e.*, the instant case). Areeda suggests that in a vertical situation involving an alleged conspiracy between a supplier and a coerced dealer, the subordinate dealer should not be subjected to antitrust liability. 6 Areeda, Antitrust Law ¶ 1408d at 47-48 (1986). Accordingly, he opines:

> The precedents are numerous that a §1 conspiracy arises when an unwilling dealer, to avoid termination by [its] supplier, promises . . . to deal exclusively . . . . Of course, the vice of these

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to deal situation, we required: 1) action contrary to the co-conspirator's economic interest; and 2) a satisfactory demonstration of a motivation to enter an agreement as required in *First Nat'l Bank v. Cities Serv. Co.*, 391 U.S. 253, 287 (1968). These requirements insulate from liability coincidental, as opposed to concerted, parallel refusal to deal cases.

The case *sub judice* arises in an altogether different factual context. In this vertical matrix and given our standard of review, we find that the record is replete with evidence of Armstrong's motive and Stern's dependence upon Armstrong, should the jury choose to credit TINS' evidence. Thus we need not require the same checks against speculation in a vertical case as we do in a conscious parallelism case. As a factual matter as well, the evidence, if it is credited by the jury, suggests that Stern acted against its economic interest in reneging on distributing TINS.

> vertical restraints, if there is one, is not that the coerced buyer, for example, agrees to the seller's demands, but that the seller has market power and uses it to restrain competition.

Id. *Accord* 2 Kintner: Federal Antitrust Law §9.18 at 41-43 (unanimity of action is required and the co-conspirator's participation need only promote *his own* anticompetitive self-interest); *Milgram v. Loew's, Inc.*, 192 F.2d 579, 585 (3d Cir. 1951), *cert. denied*, 343 U.S. 929 (1952) (conspiracy is based upon three elements: 1) knowledge that concerted action in the scheme is contemplated; 2) uniform participation; and 3) pursuance of the scheme in apparent contradiction of the competitive interests of the participants). *See also Delaware Valley Marine Supply Co. v. American Tobacco Co.*, 297 F.2d 199 (3d Cir. 1961), *cert. denied*, 369 U.S. 839 (1962) (finding no conspiracy in a conscious parallelism action in which a co-conspirator did not act contrary to its economic needs).

Both Areeda and Kintner recognize that the motivations driving vertical co-conspirators will differ. Our caselaw does not controvert this sound reasoning. We conclude that although vertically aligned co-conspirators must share a commitment to a common scheme which has an anticompetitive objective, they need not share an identical motive for engaging in concerted action in violation of section 1 of the Sherman Act. We thus will vacate the directed verdict on TINS' section 1 claim and remand for a new trial on this count of the plaintiffs' complaint.

B. *Breach of Contract*

The plaintiffs also challenge the district court's May 25, 1988 grant of summary judgment in favor of Armstrong on their breach of contract claim. This claim is governed by Pennsylvania law as stipulated in the TINS/Armstrong contract. Our review of a grant of summary judgment is plenary.

At Count 3 of their Complaint, the plaintiffs averred that Armstrong's conduct--allegedly "improperly pressur[ing]" Stern to withdraw from TINS--constituted a breach of the settlement reached between TINS and Armstrong in early 1984. In granting summary judgment, the district court ruled that the settlement agreement did "not place any continuing duty on Armstrong to instruct its representatives not to discuss the TINS program with Armstrong wholesalers." J.A. at 70. In this appeal, the plaintiffs contend that the district court's construction is legally unsound and renders the settlement agreement useless to TINS, "eliminating any conceivable reason Fineman might have had to sign it."[33]

Our task must be to interpret the language of the settlement agreement in conformance with the intention of the parties at the time of contracting. *Ress v. Barent*, 548 A.2d 1259, 1262 (Pa. Super. 1988). We glean further guidance from the Supreme Court of Pennsylvania:

> In order to determine the meaning of the agreement, we must examine the entire contract since it is well settled that in construing a contract the intention of the parties governs and that intention must be ascertained from the entire instrument taking into consideration the surrounding circumstances, the situation of the parties when the contract was made and the objects they apparently had in view and the nature of the subject matter.

Lower Frederick Twp. v. Clemmer, 543 A.2d 502, 510 (Pa. 1988) (*quoting Mather Estate*, 189 A.2d 586, 589 (Pa. 1963)). The Pennsylvania Superior Court has instructed that "the intention of the parties is the foremost consideration" in construing a contract. *Vogel v. Berkley*, 511 A.2d 878, 880 (Pa. Super. 1986). "The court's interpretation must be one

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[33] The plaintiffs also make mention of an implied duty of good faith and fair dealing. As Armstrong points out, this allegation appears to have arisen initially upon appeal. Therefore we decline to address it.

which indicates the most reasonable and natural conduct of the parties based upon the intended result of the contract." *Id.* at 880-81. With these principles of contract construction in mind, we turn to the TINS-Armstrong settlement agreement.

The settlement agreement required Armstrong's Floor Division Vice President Dennis Draeger to send a designated letter to five specifically identified Armstrong distributors to assure them that Armstrong had no objection to their distributing TINS.[34] Settlement Agreement ¶ 1. J.A. at 7768. Draeger was also to follow-up those letters with personal telephone calls to confirm the substance of the letters. *Id.* Armstrong likewise agreed to provide a letter addressed to

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[34] In pertinent part, this letter represented Armstrong's position with respect to TINS as follows:

> We believe that specialization of sales management and sales personnel is the most effective way for a wholesaler to compete in the resilient flooring business.
>
> Mr. Fineman has assured us that it would be unnecessary to use the specialized selling staff on an ongoing basis to service or further promote his program. On that basis, we have become convinced that Mr. Fineman's program would not adversely affect this specialization when your Armstrong specialized selling force is used only for the initial presentations of TINS to potential TINS retail subscribers with a minimal time commitment of your selling force thereafter.
>
> Therefore, based upon Mr. Fineman's assurances, we advise you that Armstrong does not object to any Armstrong wholesaler utilizing the TINS program. You have my personal assurance, [insert name of addressee], that whatever independent business decision you make regarding the TINS program will not in any manner affect our goal of working together as a team.
>
> It is not the policy of Armstrong to express any opinions on products other than their own and, therefore, Armstrong expresses no opinion for or against the use of TINS.

J.A. at 7772-73.

Fineman without restrictions as to its use.[35] Settlement Agreement ¶ 2. A third letter was to be sent to any Armstrong distributor who questioned Armstrong's position with respect to TINS. Settlement Agreement ¶3. This letter is substantively the same as the letter Draeger was required to send to the five Armstrong distributors designated by Fineman pursuant to

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[35] This letter reads:

Dear Mr. Fineman:

Thank you for your time last week and your explanation of TINS. It is unfortunate that we have had a misunderstanding relating to the use of TINS by Armstrong wholesalers. As you know, Armstrong believes that specialization of sales management and sales personnel is the most effective method of distribution of our resilient flooring products. Thanks to your explanation and assurances, we now realize that the TINS program would not adversely affect this specialization concept.

Our other concern was the degree of availability of the TINS program to our wholesalers. You have addressed this concern by assuring us that if TINS is made available to an Armstrong wholesaler in a particular trading area, TINS will be made available on a competitively equal basis to all other Armstrong wholesalers in that particular trading area.

Therefore, Mr. Fineman, I have sent the attached letters to certain Armstrong wholesalers with which you are having negotiations. These letters are intended to clear up any misunderstandings and assure those wholesalers that Armstrong is not, in any way, attempting to influence their independent business decisions relating to the use of TINS. Of course, you must realize that Armstrong cannot, as a matter of policy, recommend a preference for any product which is neither manufactured nor marketed by Armstrong World Industries, Inc. We continue to follow this policy with respect to TINS.

Sincerely,

D. M. Draeger

J.A. at 7775.

paragraph 1. Either Fineman or TINS could request such a letter from Armstrong, or they could inform the wholesaler to make the request. *Id.*

Armstrong argues that, absent a request pursuant to paragraph 3, it did not owe a continuing obligation under the settlement agreement. The plaintiffs fail to meet this contention directly, implicitly recognizing that the plaintiffs failed to trigger Armstrong's obligation under paragraph 3. Nevertheless, they suggest that if the settlement agreement did not establish a continuing obligation, the plaintiffs gained nothing from signing it. Clearly, the unambiguous language of paragraph 3 imposed a continuing obligation upon Armstrong only in response to a triggering request.

The plaintiffs' more persuasive argument pertains to an alleged continuing obligation under paragraph 4. Appellant's Reply Brief at 17. Paragraph 4 of the settlement agreement provides:

> Armstrong represents that it has instructed all of its floor division district managers not to discuss the TINS program with Armstrong wholesalers and to refer any inquiries from wholesalers to senior sales management in Lancaster, Pennsylvania. Armstrong has further instructed its floor division district managers to inform their field representatives and personnel of said instruction.

If this language were susceptible to the district court's interpretation that it imposed only a one-time obligation upon Armstrong, according to TINS, the spirit of the agreement is undermined and TINS received inadequate consideration. For example, under this restrictive construction, Armstrong could have delivered a subsequent contradictory instruction and still have been deemed in compliance with the settlement agreement. Or, alternatively, Armstrong's district managers could have deliberately disobeyed their instructions without subjecting Armstrong to liability for breaching the agreement.

This restrictive interpretation of paragraph 4 reduces Armstrong's obligation to a hollow and meaningless exercise. The implicit assumption underlying paragraph 4 is that once instructed, Armstrong's district managers will prospectively comply with their instructions. The giving of a bare instruction divorced from any obligation to obey it would not have yielded anything of value to TINS. It follows that the only reasonable construction of paragraph 4 includes a continuing representation that Armstrong's district managers will abide by their instructions and that distributors' inquiries about TINS would be referred to Armstrong's Lancaster headquarters.

Armstrong contends in this regard that a restrictive reading of paragraph 4 should stand because TINS received adequate *quid pro quo* in paragraph 3 (providing for an Armstrong letter upon request). We reject this contention because, read as a whole, the settlement agreement provided two prophylactic measures against prospective Armstrong interference: 1) the enunciation by Armstrong's Lancaster headquarters of a neutral position on TINS (paragraph 4); and 2) confirmation of that position upon request in the form of a letter (paragraph 3). The first measure, insofar as it dictated the silence of Armstrong's district managers, by its terms was expected to operate without a specific request. In combination, the two provisions cover all the bases. We conclude that paragraph 4 of the settlement agreement did impose a continuing obligation upon Armstrong. For this reason, we will vacate the grant of summary judgment and remand this claim for trial on the question of whether that obligation was breached.

VII. *Election of Remedies*

Because we will remand this matter for a new trial upon TINS' tortious interference, Sherman Act section 1 and breach of contract claims, the district court may again confront the issue of an election of damages. Pursuant to the verdict, the district court entered judgment for TINS on the antitrust claims in the amount of $58,500,000, trebling the $19.5 million awarded by the jury, or at TINS' election, $217,700,000 for compensatory and punitive damages, plus prejudgment

interest. J.A. at 89.[36] TINS claims that it is entitled to recover both sums of damages. Since we have reinstated the contract claim, we will also address that count.

The district court accurately noted that TINS had premised both its antitrust and its tort damages upon its loss of future profits; we presume that the breach of contract damages would be predicated upon that same loss. For purposes of

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[36] This ruling was in part premised upon a concern that the jury had been unable to convey coherently whether any portion of the $17.7 million in antitrust damages and $19.5 million in tort damages awarded to TINS overlapped each other.

> The district court had instructed the jury as follows:
>
> If, but only if, you have awarded monetary damages as set forth in answers to *both* questions 4 and 10, does all or any part of each award represent the same damages, and if so, what sum of money is included in both awards?

J.A. at 100.

The jury first answered $37.2 million, revealing that it had simply added the two numbers, so the district court reinstructed the jury on that point: ". . . you can't recover twice for the same injury. . . . question number 11 asks you really, was there an overlap? . . . If there was commonality, if there was overlap, if there is potential for double recovery under both questions four [tort damages] and 10 [antitrust damages], then question 11 asks you to tell me what amount is common to both." J.A. at 7243-44.

The jury then returned with an answer of $1.8 million, which, perhaps coincidentally, also represents the difference between $19.5 and $17.7 million. Concerned that the jury may have merely subtracted, and not understood the overlap instruction, the district pointed out that their figure equalled the difference between the two damage awards and explained that subtracting them would not have conformed to his instruction. J.A. at 7251. After retiring once again, the jury returned "moments later" with a note "We stand by it."

The district court concluded that the jury's $17.7 million tort award equalled the damage figure of lost profits claimed by TINS' expert witness James Kobak whereas the record lacks any substantiation for an additional $17.7 million in lost profits on the antitrust claims, as would be true if the "overlap" were truly $1.8 million. J.A. at 101-02. Our independent review of the record also compels this finding.

compensatory damages, then, the district court appropriately limited TINS to a single recovery for lost profits. We are unpersuaded that a plaintiff whose case concerns a single course of conduct (Armstrong's interference with Stern's and TINS' prospective contractual relationship) and a single injury (TINS' lost future profits) should recover those profits twice or thrice over for each legal theory advanced in favor of liability. This would yield an unwarranted windfall recovery. No matter how labeled, TINS presented a single loss of future profits to the jury. Simply because TINS was able to wrap that loss into several different legal theories of recovery does not entitle it to recoup twice. Thus the district court may appropriately award a single compensatory damage figure, which might, upon retrial represent the jury award arising from the breach of contract claim, compensatory tort damages, or the antitrust damages prior to trebling.[37]

The same principle applies to the alternate punitive damage awards; TINS must elect between recovering under either tort law with any punitive damages or under its antitrust claim with its treble damages. TINS reasons that the recovery of both punitive damages and trebled antitrust damages would not constitute "double recovery," citing differing purposes allegedly served by punitive and trebled damages. Whereas traditional punitive damages serve to deter wrongful conduct and punish a tortfeasor, TINS argues that Congress envisioned that an additional remedial purpose would be served by trebled antitrust damages, namely the encouragement of private damages actions. *See Brunswick Corp.*, 429 U.S. at 485-86 & n.10. Accordingly, TINS suggests that recovery of both awards would not be duplicative and would promote remedial and desirable private antitrust actions. *See American Soc'y of Mechanical Engineers Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 575 (1982) (". . . the antitrust private action was created primarily as a remedy for the victims of antitrust violations").

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[37] We assume that because each would be based upon lost profits, these awards would be identical; if not, we suggest that the district court mold them to the conform to the evidence.

TINS is only partially correct in our view. Although treble damages are not solely punitive in character, they do serve a penal and deterrent function in addition to a remedial one, and as a consequence do overlap somewhat with punitive damages. *See Brunswick Corp.*, 429 U.S. at 477; *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 139 (1968). Moreover, we fail to discern how requiring an election of damages would undermine the remedial purpose of trebled antitrust damages. Under an election scheme, the plaintiff will simply choose the larger of the alternative damage awards. Where a plaintiff can predict that trebled antitrust damages may exceed a compensatory and punitive damage award, an election scheme will not diminish a private party's incentive to bring an antitrust claim.

In the event that TINS prevails upon more than one cause of action upon retrial, we hold that the district court may properly require it to elect either tort or antitrust recovery and that TINS may only recover once for compensatory damages.

VIII. *Conclusion*

We will affirm those orders of the district court granting judgment n.o.v. to Armstrong on the Sherman Act section 2 claim and Fineman's individual tort claim. We will reverse the order of the district court granting judgment n.o.v. on TINS' tort claim and affirm the grant of a new trial on that claim. We will vacate the directed verdict on the Sherman Act section 1 claim and the summary judgment on the breach of contract claim.

Finally, we will remand this matter to the district court for a new trial on TINS' tortious interference, breach of contract and Sherman Act section 1 claims.

The assignment of costs will be set forth in a separate order.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ELLIOT FINEMAN and THE INDUSTRY NETWORK SYSTEMS, INC.,

Plaintiffs,

v.

ARMSTRONG WORLD INDUSTRIES, INC.,

Defendant.

Civil Action No. 84-3837

OPINION

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BISSELL, *District Judge*

This matter arises pursuant to several motions made by the defendant in light of the jury verdict reached on April 19, 1991. Defendant Armstrong World Industries, Inc. ("Armstrong") has renewed its earlier motion to dismiss all claims of the plaintiff, for judgment notwithstanding the verdict (J.N.O.V.), and for a new trial in the alternative.

I. *FACTS AND BACKGROUND*

Trial in this action took place over nearly three months, generating considerable evidence. Necessarily, then, the following is merely a summary of the background and procedural history. Where relevant to the motions herein, additional facts and evidence will be considered.

Plaintiffs are Elliot Fineman, a New Jersey resident, and The Industry Network System, Inc. ("TINS"), a New Jersey corporation of which Elliot Fineman is the majority shareholder.[1] Defendant Armstrong is a large corporation which manufactures, *inter alia*, floor covering, more particularly "resilient" floor covering often called linoleum in common parlance. In the time period most pertinent to this litigation, Armstrong also manufactured carpeting. Armstrong's products are distributed through independent companies known as wholesalers or distributors who maintain warehouse stocks of such products and use their sales personnel to solicit retailers or others to purchase such products.

In 1982 and 1983, Elliot Fineman and TINS were developing a "video magazine" for the floor covering industry.

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[1] Carol Arena and Gail Farrar were both minority shareholders in TINS.

Essentially, the plan was that TINS would sell the monthly video to floor covering distributors, who would in turn sell subscriptions to the program to retailers. A distributor would sign a "Letter of Intent" to become a TINS distributor, and then Fineman and his staff would run a two or three day training program at the distributors' place of business. This program would teach the salespeople how to sell the TINS magazine and how to improve sales overall. (*See e.g.* Px. 8001 at 15, TINS brochure describing sales program.)

The video was designed to be similar to a printed magazine, with "articles" on various topics. The plaintiffs described the video as follows:

> The magazine consisted of four parts. The first segment featured Al Wahnon, the editor of the industry newspaper (Floor Covering Weekly) who went behind the scenes of current relevant news stories and discussed and analyzed them from the floor covering retailers point of view. The second section featured plaintiff Fineman talking to professionals, such as economists and professors, or people whose areas include consumer attitudes, styling, design and from time to time sports people to discuss motivation. The third segment featured senior vice president Gail Farrar who travelled on site to retail stores throughout the country with a television crew. She interviewed at their store those retailers who are doing things that are successful, outstanding and helping them accomplish key

> goals. The fourth section featured the local TINS Distributor who used that segment as a marketing tool. Profits were to be earned from the sale of the magazine subscriptions, advertising royalties and commissions from the sale of video equipment.

(Compl., ¶ 11).

In early 1983, when TINS first launched its magazine, it encountered some difficulties recruiting floor covering distributors to become TINS distributors. Fineman accused Armstrong of exerting pressure on Armstrong distributors to dissuade them from becoming TINS distributors. These accusations resulted in an "Agreement of Settlement" between TINS and Armstrong on January 12, 1984, signed in order to avoid litigation.

In the following months, Fineman solicited at least six Armstrong wholesalers. Of these, three became TINS distributors, one remained ready to do so, and two declined. Fineman and TINS filed the present action on September 14, 1984, alleging that one of the distributors that declined, Stern & Company of Windsor, Connecticut, did so as a result of renewed pressure from Armstrong.[2] Plaintiffs contended that TINS was in a precarious financial condition as a result of the earlier wrongful acts of Armstrong such that losing Stern caused the company to fold. Plaintiffs therefore sought damages from Armstrong under various theories, including tortious interference with contract and antitrust violations.

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[2] Plaintiffs' complaint alleged that Armstrong also pressured Nelson & Small (the other declining distributor from New England), but this claim was dismissed by summary judgment in this Court's Opinion and Order of May 25, 1988.

This Court conducted a jury trial from January 23, 1991 until April 18, 1991.[3] The trial included testimony of more than 50 witnesses, a transcript of a thousand pages, conflicting opinions by expert witnesses, and a set of jury instructions of more than 80 pages. By the end of the trial, the only claims remaining were TINS' and Fineman's claim for tortious interference by Armstrong with TINS' business relationship with Stern and TINS' claims for monopolization and attempt to monopolize under § 2 of the Sherman Antitrust Act. On April 19, 1991, the jury returned a verdict in favor of the plaintiffs on all claims. On the tortious interference claim, the jury awarded $17.7 million to TINS and $2.275 million to Fineman in compensatory damages, and $200 million to TINS in punitive damages. The jury also awarded TINS $19.5 million in compensatory damages on the antitrust claims. Finally, the jury determined that $1.8 million was the "overlap" between the tort and antitrust damages awarded to TINS.[4]

Armstrong presently seeks judgment notwithstanding the verdict, or, in the alternative, a new trial.[5]

II. *JUDGMENT NOTWITHSTANDING THE VERDICT*

A. *Standards Governing J.N.O.V.*

Federal Rule of Civil Procedure 50(b) provides:

> **(b) Motion for Judgment Notwithstanding the Verdict.** Whenever a motion for a directed verdict at the close of all the evidence is denied or for any

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[3] The trial was subject to breaks in the presentation of evidence, some caused by this Court's schedule and others by the parties and their counsel.

[4] This determination is the basis for one of the defendant's motions for a new trial.

[5] All new trial motions will be discussed in a separate opinion to be issued shortly.

> reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with the party's motion for a directed verdict.... A motion for new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed....

Thus, a prerequisite to moving for a J.N.O.V. under Rule 50(b) is that the moving party must have moved for a directed verdict at the close of all the evidence. *Associated Business Telephone Systems Corp. v. Greater Capital*, 729 F.Supp. 1488, 1502 (D.N.J.), *aff'd*, 919 F.2d 133 (3d Cir. 1990) (citing *Skill v. Martinez*, 91 F.R.D. 498, 515 (D.N.J. 1981), *aff'd*, 677 F.2d 368 (3d Cir. 1982)). In fact, "[i]t is not enough if a party moves for a directed verdict at the close of their case. Rather, in order to preserve the right to move for a J.N.O.V., the moving party must renew his motion for a directed verdict at the close of all the evidence." (*Id.*, citing *United States for the Use and Benefit of Roper v. Reisz*, 718 F.2d 1004, 1007 (11th Cir. 1983)).

There are exceptions to the latter requirement, in certain circumstances where, as detailed in *Skill*:

> (a) there has been substantial, if not literal compliance with the rule;
>
> (b) where manifest injustice will otherwise occur since the verdict is totally without legal support;
>
> (c) where the trial judge in effect excused the failure to renew the motion; and
>
> (d) where the additional evidence was brief and inconsequential.

(*Id.*, citing *Skill*, 91 F.R.D. at 515 n. 14). In the present matter, Armstrong made motions for directed verdict at the end of all the evidence. The motions included all of the arguments made in its motions for J.N.O.V. presently being considered.

The plaintiffs, however, strenuously object to the defendant's motion based on the Connecticut Business Opportunity Investment Act ("Connecticut Act") on procedural grounds, claiming that Armstrong has waived this "defense." Specifically, plaintiffs claim that Armstrong cannot rely on the Connecticut Act because the issue was not asserted in its answer as required by Fed. R. Civ. P. 8(c).

The plaintiff's arguments are without merit, for two reasons. First, the defendant specifically raised the Connecticut Act in the Pretrial Memorandum and Order, as follows:

> 12. Whether the alleged contract or prospective business relationship between Stern and the TINS Corporation was unlawful under the Connecticut Business Opportunity Act, or was otherwise without legal effect, and any alleged interference therewith was therefore not a tortious act?

(Pretrial Memo, Defendant's Legal Issues at 93). In this Court and the Third Circuit, the Pretrial Order governs the ensuing litigation.

> Under Federal Rule of Civil Procedure 16, the pretrial order "shall control the subsequent course of the action unless modified by a subsequent order." When entered, the order limits the issues for trial and takes the place of the pleadings covered by the pretrial order. *See Basista v. Weir*, 340 F.2d 74, 85 (3d Cir. 1965); *Hoagburg v. Harrah's Marina Hotel*, 585 F. Supp. 1167, 1175 (D.N.J. 1984). Indeed, the pretrial order operates to preserve a claim or defense that would normally be waived by proceeding to trial. *See United States v. Hougham*, 364 U.S. 310, 316, (1960); *reh'g denied*, 364 U.S. 938 (1961); *Jenkins v. Carruth*, 583 F. Supp. 613, 615 (E.D. Tenn.), *aff'd*, 734 F.2d 14 (6th Cir. 1984); *United States v. Texas*, 523 F. Supp. 703, 720 (E.D. Tex. 1981).

Benvenuto v. Connecticut General Life Insurance Co., 643 F. Supp. 87, 88 (D.N.J. 1986). *See also Petree v. Victor Fluid Power, Inc.*, 831 F.2d 1191, 1194 (3d Cir. 1987) ("The finality of the pretrial order contributes substantially to the orderly and efficient trial of a case" and "supersedes the pleadings"). Because Armstrong included this claim in the Pretrial Order, it did not waive its right to assert this legal theory, and the plaintiffs had sufficient notice thereof.

Plaintiffs' reliance on cases such as *Kilbarr Corp. v. Business Systems, Inc.*, 679 F. Supp. 422 (D.N.J. 1988), *aff'd*, 869 F.2d 589 (3d Cir. 1989), is misplaced. In *Kilbarr*,

the defendants attempted to raise an issue for the first time after the matter had been tried, heard on appeal, and then remanded. In contrast, defendant herein raised the issue in the pretrial order and again by motion for a directed verdict at the close of the evidence.

Similarly, the present matter is distinguishable from *Bradford-White Corp. v. Ernst & Whinney*, 872 F.2d 1153 (3d Cir.), *cert. denied*, 110 S. Ct. 542 (1989), in which the defendant did raise the defense in its answer, but failed to file motions or present argument on the defense until after the jury reached a verdict and the judgment was entered. (*Id.* at 1154). The trial court refused to consider the defense because it was a "new issue, not raised at trial, premised on a noncontrolling decision which was reported prior to trial." (*Id.* at 1154-1155). In affirming, the Third Circuit made it clear that the defendant did not attempt to establish the affirmative defense before or at trial, and therefore it would be "grossly unfair to allow a plaintiff to go to the expense of trying a case only to be met by a new defense after trial." (*Id.* at 1161). In the present matter, the defendant raised the issue of the Connecticut Act in the Pretrial Order of June 5, 1990, presented evidence concerning the issue, and made a motion to dismiss at the end of all the evidence based thereon. There is no waiver here.

The second reason for considering the Connecticut Act in the present matter concerns the burden of proof. The plaintiffs bore the burden of proving each of the elements of the tortious interference claim. One of these elements, as more fully described below, is proof that TINS had a reasonable expectation of economic advantage in its relationship with Stern. In the context of the Connecticut Act, this required the plaintiffs to prove that the Act did not render any expectation tenuous or otherwise unreasonable. Thus, the plaintiffs miss the point by asserting that Armstrong failed to establish the "defense" of the Connecticut Act, because the issue is not a defense at all. It is, therefore, this Court's determination that Armstrong's motion for J.N.O.V. is appropriate in all procedural respects.

Once it is determined that the motion is procedurally correct, the next question is the applicable standard. This standard has been given various formulations,

although they are substantially similar. "When deciding a motion for judgment notwithstanding the verdict, the trial judge must determine whether the evidence and justifiable inferences most favorable to the prevailing party afford any rational basis for the verdict." *Bhaya v. Westinghouse Elec. Corp.*, 832 F.2d 258, 259 (3d Cir. 1987), *cert. denied*, 488 U.S. 1004 (1989) (citing *Berndt v. Kaiser Aluminum & Chemical Sales, Inc.*, 789 F.2d 253 (3d Cir. 1986)). *See also E.E.O.C. v. State v. Delaware DHSS*, 865 F.2d 1408, 1414 (3d Cir. 1989). In other words, the court must determine whether a reasonable jury could have found for the prevailing party. *Newman v. Exxon Corp.*, 722 F. Supp. 1146, 1147 (D. Del. 1989), *aff'd*, 904 F.2d 694 (3d Cir. 1990) (citing *National Controls Corp. v. National Semiconductor Corp.*, 833 F.2d 491, 495 (3d Cir. 1987); *Aloe Coal v. Clark Equipment Co.*, 816 F.2d 110, 113 (3d Cir.), *cert. denied*, 484 U.S. 853 (1987); *Marsh v. Interstate and Ocean Transport Co.*, 521 F. Supp. 1007, 1008 (D. Del. 1981)). It has also been said that "the court must find, as a matter of law, that the prevailing party failed to adduce sufficient facts to justify the verdict." *Grace v. Mauser-Werke Gmbh*, 700 F. Supp. 1383, 1387 (E.D. Pa. 1988) (citing *Link v. Mercedes Benz of North America, Inc.*, 618 F. Supp. 679, 693 (E.D. Pa. 1985), *aff'd in part* 788 F.2d 918 (3d Cir. 1986)). Yet another way of enunciating the standard is as follows:

> It is well established that judgment notwithstanding the verdict may be granted only if, as a matter of law, the record is critically deficient of that minimum quality of evidence from which a jury might reasonably afford relief.

National Freight v. Southeastern Pa. Transp. Auth., 698 F. Supp. 74, 76 (E.D. Pa. 1988), *aff'd*, 872 F.2d 413 (3d Cir. 1989) (citing *Danny Kresky Enterprises Corp. v. Magid*, 716 F.2d 206, 209 (3d Cir. 1983)).

The role of the Court is quite limited when considering a motion for J.N.O.V. "[T]he Court may not weigh evidence, pass on the credibility of witnesses, or substitute its

judgment of facts for that of the jury." *National Freight*, 698 F. Supp. at 76 (citing *Blair v. Manhattan Life Insurance Co.*, 692 F.2d 296, 300 (3d Cir. 1982)). Thus, "[a]lthough a court in viewing the evidence of record may have reached a different conclusion from that reached by the jury, that alone is not reason to enter judgment n.o.v." *Newman*, 722 F. Supp. at 1147.

The defendant herein seeks J.N.O.V. on the basis that no reasonable jury could have found for the plaintiffs on each element of each claim. It also renews a motion to dismiss both plaintiffs' tort claims due to the Connecticut Act which this Court treats as a motion for J.N.O.V., although it primarily rests on legal questions, as described more fully below. The latter motion will be considered first.

B. *Plaintiffs' Tort Claims: The Connecticut Act*

The Connecticut Act requires certain types of businesses to register with the Banking Commissioner of Connecticut prior to selling business opportunities in that State. Armstrong contends that TINS was not so registered prior to its dealings with Stern, that it should have been, and that its failure rendered the relationship with Stern unenforceable, and in fact illegal. Armstrong then argues that the claim for tortious interference therewith is invalid pursuant to the terms of the statute, and so it is entitled to J.N.O.V. as to both TINS' and Fineman's tortious interference claims.

In order to understand fully Armstrong's argument, some additional facts are necessary. As stated above, Elliot Fineman solicited Stern and Company of Windsor, Connecticut to become a TINS distributor in the spring of 1984. TINS provided Stern with a brochure captioned "The Industry Network System, Stern & Company, Inc., May 24, 1984." (Px. 8001). This brochure described the sales training program that TINS would provide to Stern if Stern became a TINS distributor. It also provided a chart entitled "Preferred Distributor Annual Income Stream" showing the income to be earned by Stern from distributing the TINS Magazine and other videos. These figures included distributor profits on sales of RCA televisions and video equipment, sold for use with the

TINS Magazine as a result of an arrangement between TINS and RCA. Also available were bonuses paid to Stern and its employees for each subscription sold.

As a result of the presentation made by representatives from TINS, Stern signed a "Letter of Intent" to become a distributor on May 24, 1984. The letter provided that "Stern & Company, Inc. wishes to accpet [sic] appointment as Distributor of The Industry Network System (TINS) with marketing rights" to TINS Magazine "in the primary trading areas of [Stern] ... at a fee of $16,000" plus expenses associated with the sales training program. (Px 1100A). Stern paid a deposit of $4,000 that day.

The sales training program began at Stern's place of business on Wednesday, June 20, 1984 and continued through Friday, June 22, 1984. TINS representatives made presentations to Stern employees until late Friday afternoon, when Stern's President, Alan Abrahamson, notified TINS representatives that Stern was terminating or canceling the Letter of Intent and not going ahead with the program.

TINS alleged that Stern breached its contract and demanded payment of an additional $4,000. By letter dated June 29, 1984, Stern's attorney Steven M. Gold informed Mr. Fineman that Stern did not owe and would not pay, taking the position that the "Letter of Intent" was invalid and unenforceable. (Dx. 1003). The premise for this claim was that the Connecticut Act required businesses to register their offerings with the Banking Commissioner, which TINS had not done. So, claimed Mr. Gold, the "Letter of Intent" was invalid and TINS was potentially subject to the authority of the Commissioner. Violations could result in fines, imprisonment, and various forms of equitable action such as appointment of a receiver. The final result was an exchange of mutual releases of all claims between TINS and Stern in August 1984.

Armstrong argues in support of its motion for J.N.O.V. that the "Letter of Intent" was properly voided by Stern based on the Connecticut Act, relying upon its legislative history and statutory language. As a result, the "Letter of Intent" between Stern and TINS could not be the basis of *any*

claims, including those made by plaintiffs herein. Thus, Armstrong seeks J.N.O.V. dismissing all the tortious interference claims of the plaintiffs.

This Court agrees with Armstrong, although under a slightly different analysis, that it is entitled to a directed verdict on all of plaintiffs' state-law tort claims. This Court had reserved decision on this question, preferring to permit the case to go to the jury in order that all parties, this Court and any reviewing court would have the benefit of a jury verdict on all claims presented to it, a procedure clearly contemplated by Rule 50(b). Now, however, defendant's motion must be addressed as a motion for J.N.O.V. It will be granted for the reasons which follow.

This Court determined, on directed verdict motions at the end of the plaintiffs' case, that New Jersey law governs the plaintiffs' tort claims. In so doing, this Court recognized that for these pendent claims, this Court must apply New Jersey's conflict of laws rule, which embodies a "governmental interest" approach to choice of law questions. *Veazey v. Doremus*, 103 N.J. 244, 248 (1986). Under that analysis, the determinative law is that of the state with the greatest interest in governing the particular issue. *See, e.g., White v. Smith*, 398 F. Supp. 130, 134 (D.N.J. 1975); *McSwain v. McSwain*, 420 Pa. 86, 94, 215 A.2d 677, 682 (1966). Particularly in light of the fact that plaintiffs are New Jersey residents and the repercussions of the alleged injuries were felt here, this Court reiterates its view that New Jersey substantive law governs the plaintiffs' claims for tortious interference with prospective economic advantage. Therefore, in determining whether the plaintiff provided sufficient evidence to withstand the motion for J.N.O.V., this Court looks to New Jersey law to determine the necessary elements of the claim.

The New Jersey courts have relied on the *Restatement (Second) Torts* for the definition of the cause of action. (*See e.g. Norwood Easthill Assoc. v. N.E. Watch*, 222 N.J. Super. 378, 385 (App. Div. 1988)). In the present matter, the relevant Restatement section is § 766B:

§ 766B Intentional Interference with Prospective Contractual Relation

One who intentionally and improperly interferes with another's prospective contractual relation (except a contract to marry) is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation, whether the interference consists of

(a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or

(b) preventing the other from acquiring or continuing the prospective relation.

The cause of action requires a tripartite situation wherein a third party intentionally and improperly interferes with a relationship between two other parties, from which relationship the complaining party reasonably expected to receive economic benefit. *Borbely v. Nationwide Mutual Insurance Co.*, 547 F. Supp. 959, 976 (D.N.J. 1981). Thus, the elements which the plaintiff must prove are (1) that there existed a reasonable expectation of economic advantage or benefit belonging or accruing to the plaintiff; (2) that the defendant knew of such expectancy; (3) that the defendant wrongfully, intentionally interfered therewith; (4) that, in the absence of interference it is reasonably probable the plaintiff would have realized his economic advantage; and (5) that the plaintiff sustained damage as a result thereof (proximate cause and proof of damages). (*See* Jury instructions at 24-25).

As suggested by the Restatement, it is no defense to such a claim that the contract interfered with is not enforceable because

> contracts which are voidable by reason of the statute of frauds, formal defects, lack of consideration, lack of materiality, or even uncertainty of terms, still afford a basis for a tort action when the defendant interferes with their performance.

Harris v. Perl, 41 N.J. 455, 461 (1964) (citing Prosser, *Torts* § 106 at 726 (2d ed. 1955)). Thus, for example, the *Harris* Court determined that a buyer was responsible for tortious interference with prospective economic advantage to the broker even where no broker contract had been completed. (*Id.* at 462). The Court said that "[t]he economic facts and the expectations of fair men with respect to real estate brokerage are clear enough. The role of the broker is to bring buyer and seller together at terms agreeable to both, and both know the broker expects to earn a commission from the seller if he succeeds." (*Id.*) That expectation was therefore protected.

Although there is a cause of action for tortious interference with respect to an unenforceable contract in some situations, this rule is not without limitations. These limitations depend on the nature of the relationship with which the defendant interfered. For example, in *Borbely*, the court granted the defendant's motion for J.N.O.V. on plaintiff's tortious interference claim because it determined that the contracts in question were terminable at will. Since the defendant had the right to terminate them at will, it could not be said that termination was wrongful. (547 F. Supp. at 976).

Prosser has also identified some of the limitations on the claim:

> Virtually any type of contract is sufficient as the foundation of an action for procuring its breach. It must of course be valid, in force and effect, and *not illegal as in restraint of trade, or otherwise opposed to public policy*, so that

> the law will not aid in upholding it.

(Prosser, *Torts*, § 129 at 994 (5th ed. 1984)) (emphasis added). In other words, that a contract is unenforceable is not a bar to a tortious interference claim, but that a contract is invalid as opposed to public policy is. As one court faced with a contract void due to violation of a licensing statute put it, plaintiff's "analogy to the statute of frauds is not apt, for that statute does not make the transaction illegal for lack of writing but merely denies the aid of the court in enforcing it." *Tanenbaum v. Sylvan Builders, Inc.*, 50 N.J. Super. 342, 355 (App. Div. 1958), *modified on other grounds*, 29 N.J. 63 (1959). This is as it should be, because the reason that the law protects otherwise unenforceable contracts from tortious interference is that "[i]n a civilized community, which recognizes the right of private property among its institutions, the notion is intolerable that a man should be protected by the law in the enjoyment of property once it is acquired, but left unprotected by the law in his efforts to acquire it." (*Harris*, 41 N.J. at 462) (quoting *Brennan v. United Hatters of North America*, 73 N.J.L. 729 (E. & A. 1906)). This policy is not served where the contract is illegal or void as against public policy.

Prosser further explains the policy behind allowing recovery for tortious interference with prospective economic advantage: "[i]n such cases there is a background of business experience on the basis of which it is possible to estimate with some fair amount of success both the value of what has been lost and the likelihood that the plaintiff would have received it if the defendant had not interfered." (Prosser, *Torts*, § 130 at 1006 (5th ed. 1984)).

Thus, although not required to prove that their relationship with Stern was an enforceable contract, TINS and Fineman had to prove that they had a reasonable expectation of economic advantage arising from that relationship. As the comments to the Restatement say, "[t]he relations protected against intentional interference ... include any prospective contractual relations ... *if the potential contract would be of pecuniary value to the plaintiff.*" (*Restatement (Second) Torts* § 766B, Comment c) (emphasis added). As a matter of law, this

requirement was not met in the present matter, because of the impact of the Connecticut Act.

The relationship between Stern and plaintiffs may be characterized as a prospective contract. Accordingly, if the question before the Court was its validity as between Stern and plaintiffs, this Court would apply Connecticut law because in contract cases, New Jersey courts apply the law of the place where the contract is made, "unless the dominant and significant relationship of another state to the parties and the underlying issues dictates that this basic rule should yield." *Ramsbottom v. First Pennsylvania Bank*, 718 F. Supp. 405, 407 (D.N.J. 1989) (quoting *State Farm Mutual Auto. Ins. Co. v. Estate of Simmons*, 84 N.J. 28, 37, 417 A.2d 488 (1980)); *see also McFadden v. Burton*, 645 F. Supp. 457, 465 (E.D. Pa. 1986). The assessment of the significant relationship should "encompass an evaluation of important state contacts as well as a consideration of the state policies affected by, and governmental interest in, the outcome of the controversy." *Ramsbottom*, 718 F. Supp. at 407 (quoting *State Farm*, 84 N.J. at 37, 417 A.2d 488). Under this analysis, Connecticut law would apply to determine the validity of the "Letter of Intent" primarily because it was to be fully performed there, but more importantly, because Connecticut's law concerning business opportunities represents the dominant and significant policy of protecting its residents in commercial dealings.

This Court has already determined that Connecticut law does not apply to determine the rights and liabilities as between Armstrong and plaintiffs. However, the reasonable expectation of economic advantage arising from the Stern-TINS relationship necessarily requires this Court to consider the nature of that relationship, under the law which governed it: that of Connecticut. This requires a careful scrutiny of the Connecticut Act, relied upon by Stern's counsel in declaring void Stern's prospective relationship with TINS, and upon which Armstrong relies in support of one aspect of its motion for J.N.O.V.

The Connecticut Act, Conn. Gen. Stat. § 36-503 *et. seq.*, was enacted to police business opportunities which are characterized by "high pressure salesmen who flash in and out

of motel rooms and are gone before the investor knows he's been fleeced." Woolf[6], *The Connecticut Business Opportunity Investment Act: An Overview*, 54 Conn. B. Journ. 415, 416 (1980) (quoting 12 *Continental Franchises Rev.* No. 10 at 1 and 2 (June 11, 1979)).[7]

Mr. Woolf described the Act as follows:

> In general, the Act requires sellers who plan to sell business opportunity investment programs to register such programs with the banking commissioner. Sellers of business opportunity investment programs are also required to provide prospective purchaser-investors with information necessary to make an informed decision before they make payment to the seller. In certain circumstances, sellers of these programs are also required to represent that the purchaser-investor's investments are secured in such a way as to actually provide security in the form of a bond or trust account. Finally, the Act prohibits representations which

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[6] At the time of publication of the article, Brian J. Woolf was Counsel and Executive Assistant to the Connecticut Banking Commissioner, although the article expressly states that the "opinions expressed herein are those of the author alone." Woolf later became Banking Commissioner.

[7] This view of the Connecticut Act is particularly appropriate in light of the practices of Fineman and his sales force. For example, Fineman testified that TINS prepared a script for all his salespeople (Tr. 6.126) which reflected his psychology of selling. (See *generally* Tr. 6.144-6.158). This psychology includes his view that the relationship between buyer and seller is a "war", (Tr. 6.157), in which his own salespeople "were killers." (Tr. 6.162). This kind of sales technique and attitude make it difficult for the prospective purchaser to adequately assess the item being sold and the nature of the promoting company.

> tend to mislead prospective purchaser- investors.

(*Id.*) (footnote omitted).

The Connecticut Act applies to "sellers" of "business opportunities." The Act defines "seller" as "a person who is engaged in the business of selling or offering for sale business opportunities." (§ 36-504(4)). The definition of "business opportunity" is, in relevant part:

> (6) "Business opportunity" means the sale or lease, or offer for sale or lease of any products, equipment, supplies or services which are sold or offered for sale to the purchaser-investor for the purpose of enabling the purchaser-investor to start a business, and in which the seller represents
>
> * * *
>
> (C) that the seller guarantees, either conditionally or unconditionally, that the purchaser-investor will derive income from the business opportunity; or that the seller will refund all or part of the price paid for the business opportunity, or repurchase any of the products, equipment, supplies or chattels supplied by the seller, if the purchaser-investor is unsatisfied with the business opportunity; or
>
> (D) that the seller will provide a sales program or marketing program to the purchaser-investor.

(§ 36-504(6)).

TINS' presentation brochure, coupled with the Letter of Intent, described above, make it clear that the distributorship arrangement for sale of the video magazine is within parts (C) and (D) of the definition. First, TINS guaranteed bonuses upon sales, (*see* Px. 8001 at 18), and represented particular figures which Stern would earn if it signed up as a distributor. (*See e.g.* Tr. 2.100-101 (Fineman)).

Second, TINS' training program is a marketing program within part (D), as is clear from the stated goals:

> 1. Train Distributor Sales Personnel to effectively present and close a promotional offering such as TINS.
>
> 2. Train the sales force in successful sales techniques which they will utilize in their day-to-day business dealings to produce dramatically improved results.

(TINS' brochure, Exh. Px. 8001 at 15).

The plaintiffs, however, argue that becoming a TINS distributor did not enable Stern to "start a business," thus TINS is not a seller within the meaning of the Act. (Plaintiffs' Opp. at 9). Relying on *Eye Associates, P.C. v. IncomRx Systems, Ltd.*, 912 F.2d 23 (2d Cir. 1990), plaintiffs argue that whether or not the TINS program was offered to start a business is a question of fact concerning the intent of the parties, about which there is no evidence. The plaintiffs' reliance is misplaced. The *Eye Associates* court, on appeal from a grant of summary judgment, reviewed the contract and other evidence to determine whether any issues remained. Based on such evidence, the court determined that such issues did remain and so remanded the matter. The court did not hold, as plaintiffs herein suggest, that intent fully governs the question of whether or not the TINS program was offered to "start a business."

In fact, Banking Commissioner Woolf has stated that:

> [I]f the purchaser-investor is in an already existing business, the Act would not apply. It should be noted, however, that the "existing business" concept should not be construed too broadly. In the author's opinion[8], the sale of the products, equipment, etc. to a purchaser-investor of an existing business must not substantially change, modify or add to the lines of products, equipment, etc., carried by the purchaser-investor. Any substantial changes, modifications or additions should be construed so as to preclude one from relying upon the "existing business" concept because of the substantive change in the nature of the business.

Woolf, *supra* at 419.

The plaintiff is also in error concerning the evidence in this case. There is considerable evidence showing that the TINS program was supposed to be extremely beneficial, in Elliot Fineman's estimation, to Stern by *both* increasing floor covering sales *and* generating income from the sale of products entirely new to Stern: subscriptions to the video magazine, televisions and videocassette recorders. (*See e.g.* Tr. 2.59-2.60 (Fineman)).[9] It is significant, too, that the majority of such evidence comes from the plaintiff Elliot Fineman himself. Thus, under the most reasonable definition of "new business," the TINS program constituted a completely new line of business:

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[8] This opinion was, at the time, that of only an author, but since he is now Banking Commissioner, this opinion has been specifically attributed to the Commissioner. (*See e.g. Eye Associates*, 912 F.2d at 27.)

[9] Indeed, Fineman characterized TINS as a "brand new concept," which was "revolutionary" (Tr. 6.154), thus showing that it was a new and different business from the sale of floor covering itself.

the sale of a monthly video magazine for floor covering retailers and the sale of equipment related thereto.

It has been held that the right to sell and market aircraft is a "new business" although the purchaser was already in the business of selling other kinds of transportation vehicles. (*See Eye Associates*, 912 F.2d at 27 (citing State of Connecticut, Office of the Banking Commissioner, Interpretive Opinion *In re Suma, Incorporated*, March 25, 1982)).

The evidence adduced at trial makes it clear that Armstrong met its burden of showing that TINS is within the Connecticut Act. The evidence provided by the plaintiffs in particular shows that its distributorship arrangement with Stern would enable the purchaser to modify an existing business in a substantial manner, require a payment of more than $100, and provide a sales or marketing program which would enable the purchaser to derive a profit. (Woolf, *supra* at 420). Thus, the TINS program is a "business opportunity" within the meaning of the Connecticut Act, §§ 36-504(6)(C), (D).

Overall, the plaintiffs misconstrue the burden of proof in this matter. It was their burden to prove that they had a reasonable expectation of economic advantage in their relationship with Stern, not the defendant's burden to prove that the plaintiffs did not. The defendant made it clear that the Stern-TINS relationship, and the claims against it, were void as a result of the Connecticut Act. Arguing that the evidence at trial irrefutably established that the Connecticut Act was applicable and barred plaintiffs' tortious interference claims, Armstrong moved to dismiss at the close of all the evidence, based on that statute. At that point it was incumbent upon the plaintiffs to seek to reopen their case to overcome such a showing, if they were truly surprised by the motion. No such application was made. The question herein is whether the *plaintiffs* have succeeded in overcoming the application of the Connecticut Act.

Plaintiffs' other arguments concerning this issue are unavailing. For example, plaintiffs argue that TINS was not a seller within the meaning of the statute because it offered its program to only one investor in Connecticut. (Plaintiffs' Opp.

at 10). This argument is specious in light of the uncontroverted evidence that TINS in fact sold its programs to other investors across the country. Restricting the definition of "seller" to one who sells more than one program within the State is unreasonable in light of the statute's avowed purpose of protecting buyers. Under plaintiffs' interpretation, a party could avoid application of the statute by selling to only one investor in the state on an "exclusive" basis, thus leaving the investor beyond the protection of the statute. This is an unreasonable interpretation of the statute, and this Court will not adopt it in the absence of direction from the Connecticut courts.[10]

Plaintiffs also argue that it is not clear whether TINS' distributorship arrangement for sale of video magazine subscriptions constitutes a "sales program" or "marketing program" within the Act. Plaintiffs rely on the fact that there is no definition within the Act, requiring instead a case by case analysis. (*See Eye Associates*, 912 F.2d at 28 (citations to legislative history and interpretative statements that the determination is based on a case by case analysis)). However broad or narrow the definition may be, it is beyond contention that one of the avowed benefits of becoming a TINS distributor was its sales training program as described in its brochure. (*See* above). This program is clearly a "sales" or "marketing" program, as described by the plaintiffs themselves. Furthermore, the video magazine played in open court demonstrates that it is a program designed to enhance the distributor's sales and marketing with its retailers.

Plaintiffs also argue that Armstrong did not prove that TINS failed to comply with the Connecticut Act. Probative evidence on this question comes from the June 29, 1984 letter from Stern's counsel stating that TINS failed to register and

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[10] In *Eye Associates*, apparently the only case interpreting the Connecticut Act, the court noted that "the Act does not clearly state that companies selling a single business opportunity are exempt from its coverage. On remand, therefore, the district court will have to determine whether the sale of a single business opportunity brings the seller within the reach of the statute." (912 F.2d at 26). Accordingly, it is entirely appropriate for this Court to consider the relevant information to determine whether a party is within the statute when it only offers one opportunity within the State.

therefore its breach of contract claims were not valid. (Dx. 1003). Contrary to the plaintiffs' assertion, this letter was admitted into evidence without any restrictions as to its use, and without objection from plaintiffs' counsel. (*See* Tr. 7.123). Furthermore, Mr. Fineman testified as follows concerning the letter:

> Q. Do you recall Stern, for its part, had some claims against you?
>
> A. No, Stern had no claims against us. Their attorney came up with some kind of law that Connecticut required TINS or any company that fell in our category to get some kind of clearing with the banking commissioner ...
>
> * * *
>
> Q. Apart from whether you agreed with [your attorney] or not, Mr. Fineman, the question is, did the Stern's company assert any claims?
>
> A. They asserted a claim that [I] wasn't supposed to ask them to join the TINS network. That was their claim until I filed something with the banking commissioner.

(Tr. 7.122:1-6; 7.122:13-17). The only reasonable inference from such testimony is that Mr. Fineman did not in fact file or "get some kind of clearing" with the Banking Commissioner. Once again, defendant having introduced such evidence demonstrating that TINS did not register, it was up to the plaintiffs to show that TINS did in fact comply with the Connecticut statutory requirements. They introduced *no* evidence of such compliance.

Plaintiffs' assertion that Stern is exempted from the Connecticut requirements by virtue of its size (over $1 million net worth) is also without merit. The statute includes its own burden of proof: "In any proceeding under this subsection, the burden of proving an exemption is upon the person claiming it." (§ 36-508(e)(5)). In the present matter, the only evidence concerning Stern's net worth came from Armstrong's concerns that Stern was inadequately capitalized. (*See e.g.* Tr. 24.15-24.17 (testimony of Armstrong's credit manager)). Plaintiffs failed to prove otherwise, and failed to seek to reopen their case in order to do so. Indeed, in attempting to prove that Armstrong controlled Stern, plaintiffs went to considerable lengths to prove that Stern was actually in financial trouble. (*See e.g.* Px 5009 (Armstrong's Risk Account Analysis, Aug. 15, 1984); Px 5012 (same, Nov. 16, 1984)).

Finally, this Court should address the plaintiffs' argument that this motion should be denied because Armstrong, as a third party, cannot assert Stern's rights under the Connecticut Act. (Plaintiffs' Opp. at 19-21). Plaintiffs miss the point. The defendant is not asserting Stern's rights under the Act; indeed, Stern asserted and exercised its own rights in counsel's letter of June 29, 1984. Rather, defendant has argued, and this Court finds, that the existence of the Connecticut Act, the June 29 letter, and the other evidence cited above renders any expectation of profit from the Stern-TINS relationship unreasonable as a matter of law. The issue is not whether Armstrong was "privileged" to interfere with this void, illegal relationship. Rather, plaintiffs have failed to meet their burden of proving that the relationship engendered any reasonable expectation of economic advantage.

Thus, the Connecticut Act applied to TINS on its face, and TINS failed to take steps to comply with the requirements of the Act. These requirements are particularly interesting in light of the evidence revealed in this case. Section 36-508 of the Act imposes registration and financial disclosure requirements before a business opportunity may be presented in Connecticut. The financial information which must be provided is substantial:

> (b) The seller shall file with the commissioner (1) a balance sheet, income statement and statement of changes in financial condition of such seller as of a date not more than four months prior to the filing of the registration statement (2) a balance sheet of such seller, an income statement and statement of changes in financial position for the most recent fiscal year audited by an independent public accountant or an independent certified public accountant and (3) a balance sheet and income statement and statement of changes in financial position for the prior two fiscal years reviewed by an independent certified public accountant who provides an opinion stating that he is not aware of any material modifications that should be made to the financial statements in order for them to be in conformity with generally accepted accounting principles. If any material changes in the financial condition of such seller occur after such statements are prepared, such seller shall disclose such changes and explain their significance to the operation of a business opportunity.

(Conn. Gen. St. § 36-508(b)).

Furthermore, § 36-506 requires that the seller provide substantial information directly to the purchaser-investor, including (but not limited to) information about past business conduct, personal conduct (bankruptcy and criminal) of those involved in the venture, clear descriptions of the method by which the funds to be earned by the purchaser were

calculated, numbers of prior business opportunities sold by the seller and the names and addresses of such buyers, information about whether such purchasers voluntarily terminated the arrangement, and a copy of the financial statement required to be filed under § 36-508. In addition, the document provided to the seller, at least ten days prior to signing a contract or exchange of money, must include the following:

> (27) A section entitled "risk factors" containing a series of short concise captioned paragraphs summarizing the principal factors which make the business opportunity one of high risk or of a speculative nature. Such factors shall include, but not be limited to: The absence of profitable operations within the previous three years; an erratic financial position of the seller; the particular nature of the business in which the seller is engaged or proposes to engage; any adverse background information regarding executive officers and directors of the seller, including prior business failures, criminal convictions or personal adjudications of bankruptcy; limited experience or lack of experience of the seller's management with respect to the particular business; and the identity and relationship to the seller of any customers, the loss of any one of whom would have a material adverse effect on the seller. Where appropriate, reference shall be made to other sections of the disclosure document where more detailed information has been disclosed.

(Conn. Gen. St. § 36-506(b)(27)).

The considerable reporting requirements of the Connecticut Act clearly show that the Legislature was concerned with "fly-by-night" operations who arrived in the state, coerced funds from Connecticut businesses, and then folded or otherwise became unable to perform. This policy compels this Court to the conclusion that not only is TINS literally within the language of the Act, but application of the Act to TINS serves such policies.

TINS was exactly the sort of operation which the Connecticut legislature was interested in policing. As indicated above, the theory of the plaintiffs' case is that TINS was in a financially troubled situation at the time that Stern backed out of the Letter of Intent, such that losing Stern caused the entire company to fold. Furthermore, Fineman testified rather extensively that he never revealed his company's financial position to prospective buyers of the video magazine. (*See e.g.* Tr. 7.35-7.36 ("The last thing I would have done on any sales call would be to discuss with a prospective customer what our business plans were, our financial condition was, what the state of our situation was.")) This position, though callous and deceptive, is certainly understandable in light of TINS' substantial operating losses for the first five months of 1984, and its deficit position in the amount of $739,346 as of May 31, 1984. (Dx. 127, prepared by TINS' accountants, Seiden & Thaler, C.P.A.s, on June 22, 1984). Revelation of such information might well have caused Stern to reconsider entering a long-term relationship with TINS, since such a relationship necessarily depended upon the survival of TINS, particularly TINS' ability to bear the considerable expense of producing the monthly video magazine on which Stern would risk its reputation with its retailers. More importantly, Stern had a statutory right to this information. Therefore, this Court finds that either a Connecticut or New Jersey state court faced with

the present issue would determine that TINS was within the scope of the Connecticut Act.[11]

The evidence is beyond contention that TINS did not comply with the Connecticut Act, although required to do so. Since it failed to register, this plaintiff was prohibited by § 36-510 from making sales and committing other acts:

> *No person shall* in connection with the sale or offer for sale of a business opportunity: (1) *Sell or offer for sale* a business opportunity in this state or from this state unless it has first been registered with the commissioner and declared effective by the commissioner in accordance with the provisions of section 36-505; (2) *represent that the business opportunity will provide income or earning potential of any kind* unless the seller has documented data to substantiate the claims of income or earnings potential and discloses this data to the prospective purchaser-investor at the time such representations are made; ... (5) make any claim or representation in advertising or promotional material, or in any oral sales presentation, solicitation

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[11] Indeed, the plaintiffs' desperate arguments to the contrary only demonstrate that TINS is indeed within the scope of that Act. (See Plaintiffs' Opp. at 16). Plaintiffs assert that sellers have "significant rights" under the Act, referring to a statute of limitations and a clause requiring the purchaser to return the seller's goods upon declaring a contract void. (*Id.*) Neither of these "rights" bears any relevance to the present matter. Stern voided the Letter of Intent only five weeks after signing it and asserted its claims at that time. Furthermore, Stern had received no video magazines from TINS at the time it canceled, and had in fact spent its own money acquiring televisions and VCR's which it later had to get rid of.

> or discussion between the seller and a prospective purchaser-investor, which is inconsistent with the information required to be disclosed by this chapter; (6) directly or indirectly (A) employ any device, scheme or artifice to defraud, (B) make any untrue statement of material fact or *omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading*, or (C) engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person.

(Conn. Gen. Stat. § 36-510(1), (2), (5), (6)) (emphasis added).

There are several effects of acting in contravention of the Act, the most important of which is that the purchaser-investor may, within one year of the date of the contract with the seller, declare that contract void:

> If a business opportunity seller ... fails to give the proper disclosures in the manner required by section 36-506 ... then within one year of the date of the contract, upon written notice to such business opportunity seller, the purchaser-investor may void the contract and shall be entitled to receive from such business opportunity seller all sums paid to such business opportunity seller.

(Conn. Gen. Stat. § 36-517(a)).[12]

This is precisely what Stern did in its counsel's letter of June 29, 1984, as described above. Thus, the contract between Stern and TINS was void under the Act. This Court could, at this point, end this discussion. The underlying relationship between Stern and TINS was void by reason of the Connecticut Act pursuant to the stated policies of that State. Accordingly, as a matter of law, there was no reasonable expectation of profit from this relationship, so it cannot form the basis for tortious interference claims. Thus, the defendant is entitled to judgment notwithstanding the verdict on these claims.

However, there are several additional considerations which further support this Court's determination: policies particularly relevant to the case at bar.

Specifically, the Connecticut Act provides:

> (h) *No person who has made or engaged in the performance of any contract in violation of any provision of this chapter* or any regulation or order adopted or issued under this chapter, or who has acquired any purported right under such contract with

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[12] Contrary to the plaintiffs' assertion, there is no scienter requirement on the part of the seller before the purchaser may declare the contract void. (*See* § 36-517(a)). Under § 36-517(h), the scienter requirement applies only in the situation involving acquisition of a contract right created in violation of the statute. (*See* discussion *infra* regarding § 36-517(h)). Thus, it is inapplicable to the present situation. Scienter is required, however, before fines may be imposed upon a seller who acts in contravention of the statute. (*See* § 36-516, which is also inapplicable to the present matter.)

Similarly, plaintiffs do not even allege that the motivation of Stern in terminating the Letter of Intent is important or relevant to the application or effect of the Connecticut Act. This argument would have failed had the plaintiffs advanced it because the Act is directed to the *seller's* acts, not the purchaser-investor's.

> knowledge of the facts by reason of which its making or performance was in violation, *may base any cause of action on the contract.*

(Conn. Gen. Stat. § 36-517(h)) (emphasis added). Thus, since TINS acted in violation of the Connecticut Act, the plaintiffs' present action for interference with the relationship arising from said violation is specifically prohibited by the Act.[13]

In this regard, it should be noted that the plaintiffs' argument distinguishing void and voidable contracts is not applicable in the present situation. The Connecticut Act specifically treats a contract voided at the option of the buyer as a void contract by eliminating all claims based thereon.[14] This treatment serves the purposes of the Act, and is consistent with the policies applicable in New Jersey as well, as indicated below.

At this point, it should be reiterated that an illegal contract must be distinguished from a merely unenforceable one. As Prosser suggests, those which are unenforceable due to defects such as the statute of frauds may nonetheless form the basis of a tortious interference claim. In contrast, an illegal contract, or one that is against public policy, should not form the basis of such a claim because allowing the tortious interference claim is akin to recognizing the contract. In the present matter, application of the Connecticut Act to the Stern-TINS relationship renders the relationship illegal. Indeed, the Second Circuit's interpretation of *Tanenbaum* succinctly captures the distinction to be made here:

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[13] If a consummated contract may not be so enforced under this statute, necessarily a prospective economic relationship could not be. That is, TINS could not have sued to force Stern to execute and perform its distributorship agreement.

[14] Plaintiffs' suggestion that the registration requirements of the Connecticut Act violate first amendment rights of free speech (Plaintiffs' Opp. at 16) is so specious as to require no further comment.

> [I]t is not accurate to say that the court denies enforcement of an otherwise valid agreement, as with the statute of frauds, for the New Jersey courts have distinguished the licensing act from the statute of frauds on the basis of the *underlying illegality of conduct* in violation of the former.

Weston Funding Corp. v. Lafayette Towers, 550 F.2d 710, 714 (2d Cir. 1977) (emphasis added) (citing *Tanenbaum*, 50 N.J. Super. at 355, *modified in other respects*, 29 N.J. 63). Thus, plaintiffs' reliance on this Court's earlier opinion and its jury instructions that an unenforceable contract may form the basis of a tort claim is misplaced.[15]

This Court, sitting in diversity as to plaintiffs' tortious interference claim, must determine how a New Jersey court would respond to the present circumstances regarding the Connecticut Act. It is this Court's opinion that a New Jersey court would enforce the policies embodied in the Connecticut Act, including that represented by § 36-517(h), and rule as a matter of law that plaintiffs' tort claims are prohibited. In other words, a party who cannot sue for tortious interference with a void relationship in Connecticut may not do so by fortuitously filing its lawsuit in New Jersey.

> It is a well-accepted principle of contract law that the illegality of a contract is to be determined by the law of the place of contract. *If that law makes the contract itself illegal, of course, it is void everywhere.*

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[15] Furthermore, this Court is not bound by its summary judgment opinion to the extent that it denied the motion based on the available evidence. That opinion was based on a review of some of the evidence only to determine whether a jury question might exist. The proofs at trial were not identical, and so may support different conclusions.

Staedler v. Staedler, 6 N.J. 380, 389 (1951) (emphasis added). *See also Louis Schlesinger Company v. Kresge Foundation*, 312 F. Supp. 1011, 1028 (D.N.J. 1970) (same); *Design-4 v. Masen Mountainside Inn., Inc.*, 148 N.J. Super. 290, 293 (App. Div.), *certif. denied*, 75 N.J. 6 (1977) ("Generally, the law will not assist either party to an illegal contract; the law leaves the parties where it finds them"). Thus, the courts of New Jersey will refuse to enforce illegal or void contracts, including in situations where, as here, the contract is void as a result of a failure to comply with a registration or licensing requirement. *See e.g. Accountemps v. Birch Tree Group*, 115 N.J. 614 (1989); *Stack v. P.G. Garage, Inc.*, 7 N.J. 118, 121-122 (1951) (unlicensed practice of law); *Gionti v. Crown Motor Freight Co.*, 128 N.J.L. 407, 411 (1942) (unlicensed architect); *Design-4*, 148 N.J. Super. at 293 (unlicensed architect); *Tanenbaum v. Sylvan Builders, Inc.*, 50 N.J. Super. 342, 354 (App. Div. 1958) (unlicensed real estate broker); *Nitta v. Yamamoto*, 31 N.J. Super. 578, 584 (App. Div. 1954) (unlicensed employment agency); *Solomon v. Goldberg*, 11 N.J. Super. 69, 75 (App. Div. 1950) (unlicensed real estate broker); *accord Restatement (Second) Contracts*, § 181 (1979); 6A Corbin, *Corbin on Contracts*, § 1512 (1962). Indeed, Connecticut follows the same principle. *See e.g. Douglas v. Smulski*, 20 Conn. Super. 236, ____, 131 A.2d 225, 226 (Super. Ct. 1957) (contract for architectural services made by an unlicensed architect is "illegal and void as against public policy") (citing *Gionti*, 128 N.J.L. at 411).

Not only will the courts of New Jersey refuse to enforce an illegal or void contract, they will not permit a party to such a contract to sue for interference therewith. For example, in *Tanenbaum*, 50 N.J. Super. 342, the Appellate Division considered the plaintiff's tortious interference claim based upon a broker's "contract." The plaintiff, however, was not properly licensed and therefore was specifically precluded by statute from enforcing any contract for commissions. In refusing to allow the plaintiff to seek damages against a third party for tortious interference with such a contract, the Court stated that:

> The licensing statute ... represents the public policy of the State, and

> is not merely a regulation of private property law. The court will prohibit its circumvention by denying relief in any case where the effect, direct or indirect, of allowing an action would be to recognize a transaction consummated in violation of the statutory provision.

(*Id.* at 355). Thus, the Court determined that allowing a claim for tortious interference based on a void contract would serve to recognize the void contract, a position which is contrary to the stated public policy of New Jersey. *See also Associates Financial v. Bozzarello*, 168 N.J. Super. 211, 214, 402 A.2d 942 (App. Div. 1979) ("The express legislative intent [in requiring foreign corporations to register] was to deny to foreign corporations which decline to candidly report their activities in this State ... the use of our courts to enforce their rights. Plaintiff and its assignor cannot evade this clearly expressed legislative purpose by the wily formality of an assignment of a contract or cause of action.")

New Jersey does not have a statute which is the same as Connecticut's Business Opportunity Investment Act. However, the policies embodied in Connecticut's statute, protecting the consumer from financially unstable sellers presenting slickly packaged programs to sales targets, are not foreign to New Jersey. *See e.g.* N.J.S.A. 45:15-16.27 *et seq.* (The Real Estate Sales Full Disclosure Act, regulating promotional plans to sell land outside New Jersey to New Jersey residents); N.J.S.A. 14A:13-11 ("No foreign corporation transacting business in this State without a certificate of authority shall maintain any action or proceeding in any court of this State"); N.J.S.A. 14A:13-14 *et seq.* (Corporation Business Activities Reporting Act, requiring reporting to the state with violations resulting in closed access to the courts); N.J.S.A. 17:16A-1 *et seq.* (Reporting and licensing requirements for investment companies, violation prohibits transactions and is a misdemeanor).

Thus, enforcing the Connecticut Act by disallowing the plaintiffs' claims for tortious interference herein is consistent with stated policies of New Jersey. Accordingly, this Court determines not only that the Connecticut Act's terms result in a failure of proof on an essential element of plaintiffs' claims, but that the courts of New Jersey would enforce the policies embodied in that Act. Armstrong is entitled to judgment notwithstanding the verdict on TINS' and Fineman's claims for tortious interference with the relationship or prospective relationship with Stern.

C. *Plaintiffs' Tort Claims: Insufficient Evidence*

Even if this Court found that the Connecticut Act did not bar plaintiffs' claims, it would grant the defendant's motion for J.N.O.V. for insufficiency of the evidence. This Court has already summarized the relevant legal requirements for proving a claim of tortious interference. The evidence, even viewed most favorably towards the plaintiff, is critically deficient with respect to two of these elements: wrongful conduct and proximate cause.

1. *Wrongful Conduct*

In order for conduct to be "wrongful" there must be proof of "malice." *Louis Kamm, Inc. v. Flink*, 113 N.J.L. 582, 588, 175 A. 62 (1934) (citing *Temperton v. Russel*, 1 Q.B. 715, 728). Malice as an element of this tort is defined as the intentional doing of an act without justification or excuse.[16] *Printing Mart v. Sharp Electronics*, 116 N.J. 739, 752 (1989) (citing *Rainier's Dairies v. Raritan Valley Farms, Inc.*, 19 N.J.

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[16] The malice standard that applies to tortious interference with a prospective contract is less stringent than that required for punitive damages despite the fact that the word "malice" is used for both. As more fully described below, punitive damages may be awarded in New Jersey only where the conduct of the defendant is "particularly egregious." *Fischer v. Johns-Manville Corp.*, 103 N.J. 643, 654-55 (1986). *See also Leimgruber v. Claridge Assoc. Ltd.*, 73 N.J. 450, 454 (1977). Compare the Court's Jury Instructions at pp. 25 and 46. The use of the term "malice" in this section of the present opinion refers to the lesser standard as an element of the tortious interference claims.

552, 563 (1955)); *see also Louis Kamm, Inc.*, 113 N.J.L. at 588) (same).

In the present matter, no reasonable and rational juror could have determined that Armstrong acted wrongfully from the evidence shown by the plaintiffs. The picture which the plaintiffs painted at trial bears no resemblance to a portrait of reality, and was not created as an appeal to reason and objectivity from the jurors. Rather, plaintiffs, with trial counsel as their chief artist, created a surreal collage from detached, isolated events which they tortured and twisted in a calculated appeal to passion, fantasy, conjecture and sympathy rather than reason. The core of the plaintiffs' case is the extraction of single words, phrases and incidents taken out of context, and the recasting of them in unreasonable shapes.

Plaintiffs place considerable emphasis on one question and one answer arising at the deposition of Robert Roth taken on July 15, 1985. That question and answer relate to one small segment of a three-hour business meeting, on June 7, 1984, attended by Mr. Roth and Mr. Guzinsky of Armstrong, and Alan Abrahamson (President of Stern): Roth's response to Abrahamson's statement that Stern had agreed to become a TINS distributor. The excerpt reads as follows:

> Q. Did you say to him Alan, I don't think this makes a lot of sense in the Armstrong scheme of things, given the fact that we do have our own video program that can help you increase your profitability, that type of thing?
>
> A. That's probably what I said because we have an overlap program.

(Tr. 9.171:11-17). Based on this question and answer, plaintiffs argue that Armstrong maliciously and intentionally "scuttled" the TINS-Stern relationship by forcing Stern to withdraw.

This single question and answer, however, was plucked out of context. It appeared at the end of 15 pages in the deposition (all of which was read into the record at the trial) beginning at Tr. 9.157. A reasoned review and analysis of that entire conversation certainly will not support the argument that here was Roth insidiously, intentionally and maliciously planting in Abrahamson's mind the implied threat that big troubles lay ahead for him with Armstrong if he continued in the TINS program. Upon being confronted in the deposition with Humphrey's memorandum of September 12, 1983 (Px. 165) and being asked if he had acted consistent with that memorandum in discussing the subject of TINS with Abrahamson, Roth replied:

> But it's after the fact. He signed up for the program. The program is his. There was no discouragement on my part. He has the program.

(Tr. 9.162:13-15). Once again, on the same subject:

> Q. Did you follow Mr. Humphrey's instructions to discourage your wholesalers' participation?
>
> A. Alan had signed up for the program. Alan was a TINS distributor. It's a fait accompli. It's done.

(Tr. 9.163:16-22).

Furthermore, the excerpt of the Roth deposition read into the record by plaintiffs' counsel does not reveal any reaction from Abrahamson to Roth's comments about TINS. That subject was addressed, however, when Roth testified live before the jury. After repeating, to the jury, that he had expressed surprise that Stern had signed up for TINS because he believed there was an overlap between that program and Armstrong's video dealer training, Roth testified as follows:

Q. Did Mr. Abrahamson say anything to you when you expressed this surprise?

A. As I recall, I think he made a statement that it would fill in a void that we didn't have something like that.

Q. What would fill in the void?

A. TINS.

Q. Did he explain to you what about TINS he believed would fill a void that Armstrong didn't serve in this nation? Did he say something?

A. I can't really be specific. At that time I had never seen a TINS video, so I don't really recall specifically what he said. I know he said that, but specifically I don't.

Q. So your best recollection is he said something along those lines?

A. Right.

Q. TINS does something that the Armstrong program doesn't do?

A. Right. I think he said something like that.

Q. Did you respond to that comment?

A. I don't think so.

Q. How was it left? How long did their [sic] discussion about TINS last would you say?

A. As I recall, it was a fleeting discussion. We went on to something else.

(Tr. 17.173:2-24)).

This Court is fully aware that the jury, as instructed, was perfectly free to accept certain testimony of Mr. Roth (or any witness) and reject or accord diminished weight to other portions of testimony from the same witness. However, the constant harping at the one question and answer, taken completely out of context, and employing it as the linchpin for supposed conduct by Armstrong so heinous as not only to sustain the tortious interference and antitrust claims but also to support a claim for punitive damages goes far beyond any appeal to reason, objectivity or sound judgment. Regrettably, the rhetoric of plaintiffs' counsel drew the jurors right along with him to an irrational verdict undoubtedly reached in heavy reliance upon the unsupportable inferences which plaintiffs asked the jurors to draw from this one question and answer in the Roth-Abrahamson conversation of June 7, 1984. It is undisputed that Roth's brief, off-the-cuff remark took place within a conference which lasted several hours. Furthermore, the subject was dropped when Abrahamson said the TINS program would fill a gap in Stern's business. No jury could reasonably infer from this statement that Armstrong acted with any level of malice or intent to harm. Even in the face of the January 1984 Settlement Agreement, no jury could reasonably infer that Roth's brief discussion of TINS (rather than referring Abrahamson to Lancaster) was anything other than inadvertent. The Humphrey memo, written five days after the meeting on June 12, 1984, certainly couldn't have prompted any statement from Roth occurring on June 7. Furthermore, the statement is not itself a threat, does not suggest a threat, and did not take place in a context suggesting a threat. At the very most it was

an expression of Armstrong's view (albeit from the wrong source) to which Abrahamson had an appropriate response.

The plaintiffs' fixation on the term "assistance" in the Humphrey memo of June 12 is similarly a flagrant distortion of the evidence. The memo advised all Armstrong district managers "to inform them [Armstrong wholesalers who sought Armstrong promotional assistance for the TINS program] that we are unable to offer any assistance." (Px. 525). The plaintiffs assert that "assistance" means *all promotions*, whether or not related to the TINS magazine. (*See e.g.* Tr. 39.35-36 (Kramer Closing)). Therefore, the plaintiffs assert that the June 12 Humphrey memo created "a sinister code" which effectively barred any new promotions, and "pulled" all existing promotions from those Armstrong dealers who signed up with TINS.

Contrary to such eloquent and emotional arguments, the language of the memo taken in context allows only one reasonable inference, that Armstrong would offer no promotional assistance applicable only to the TINS magazine system:[17]

> [W]e (Armstrong) are not in a position to evaluate the effectiveness of the TINS program; however, we feel that since all Armstrong wholesalers are not involved in the program, it would be improper for Armstrong to participate in the system. Therefore, if any wholesalers request Armstrong's participation, either on a local level or a national basis, you should inform them that we are unable to offer any assistance. You should make sure

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[17] TINS was aware that this was Armstrong's position, at least as early as the generation of the January 1984 settlement. It was a position which plaintiffs own witness (Wolfe) found reasonable and understandable (*infra*).

> that your representatives are not involved in any sales presentations on this system or any other program not provided by Armstrong.

(Px. 525). The entire memo deals only with promotions related to TINS, not all promotions. Therefore this Court holds that no reasonable jury could find that the June 12, 1984 Humphrey memo creates a reasonable inference that Armstrong acted with malice.

The plaintiffs had also attempted to show, in support of their reliance on the June 12 memo regarding assistance, that there were specific promotions which Armstrong "yanked," *i.e.* made unavailable, to Stern upon learning of its Letter of Intent with TINS. These allegations were never supported by the evidence.

John Fischer, Stern's Manager of Armstrong Resilient Sales, testified that, although he told Alan Abrahamson that Armstrong would not make available promotional monies for TINS, he (Fischer) had never specifically discussed the subject of TINS with any Armstrong representative. Fischer's only such discussion in this timeframe had occurred between May 24 and June 7, 1984 in which he had sought a special price on additional Promotional Sundial resilient which he planned to use as an introductory special for TINS subscribers. Fischer also testified that Roth's assistant, Pat Lee, advised him that there was a supply of this product available; however, that it could not be made available to Fischer at a special price. Fischer testified that he never mentioned the name TINS specifically to Pat Lee.

Consistent with evidentiary principles governing a motion for J.N.O.V., this Court is prepared to assume (as the jury could have found), although contrary to Fischer's testimony, that he did specifically discuss the Promotional Sundial as a potential TINS promotion, and that Lee refused to sell it to him at a discounted price in connection with the TINS program. The Court will also assume, for purposes of the present analysis, that this Promotional Sundial "special" was the

fifty-three cent deal which was discussed in the evidence. Nowhere in the record before the Court, either directly or by permissible inference, is there evidence that Armstrong either denied to Stern any promotions or yanked from Stern any promotions previously committed and totally unrelated to Stern's effort to market TINS to the retailers, because of the mere fact that Stern was considering signing up with TINS. The only reasonable (as opposed to emotionally-based or speculative) inference from the considerable testimony on this subject is that Armstrong (whether through Pat Lee, Fischer's conclusion or the Humphrey June 12, 1984 memo) would not provide promotional "assistance" in the form of a discount on an Armstrong product made available only to a distributor for marketing to his retail customers as a TINS-related opportunity. To do so would violate Armstrong's marketing policy by providing a discount on a particular product to one of its distributors but not to another.

Plaintiff's primary witness concerning supposed "yanked" or withdrawn promotions, John Wolfe, understood that the above analysis was all that Fischer and Abrahamson were talking about when this subject was discussed at their meeting with Wolfe, following the sales presentation on June 22, 1984.[18] Wolfe understood that any decision by Armstrong either to withhold or withdraw a promotional opportunity from Stern was linked specifically to the issue of whether that

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[18] Incidentally, according to Wolfe, Abrahamson had observed, as early as Wednesday morning *at the start* of Wolfe's sales presentation to Stern's salesmen, that he was not getting strong promotional support from Armstrong for the types of resilient promotions that he had hoped to run with the TINS program. (Tr. 5.121:13-5.122:3). If Alan Abrahamson were the "Jack Palance" that plaintiffs' counsel made him out to be, concealing a conspiracy with Armstrong and plotting like a "thief" to steal the benefits of the TINS sales presentation, knowing all along that he would not go through with the TINS program because of Armstrong's pressure, can it reasonably be concluded that he would have made this revelation to Wolfe at the very commencement of the sales training session? Based on this testimony, from plaintiffs' own witness whose veracity they urged vigorously, the inevitable conclusion is NO. While not critical to this Court's adjudication of the present motions, this is but an additional example of the lack of evidentiary support for the contrary conclusion which plaintiffs' counsel urged before the jury with such fervor and colorful imagery.

promotion was going to be tied to a TINS sales effort. Moreover, Wolfe testified on direct examination that when this subject was addressed on the evening of Friday, June 22, 1984, his immediate response was that Stern (and Wolfe himself obviously) should not be surprised by this because for Armstrong to make available a promotion to a particular distributor who had signed up with TINS and was going to use the promotion solely in conjunction with marketing the TINS program, would be to favor that distributor over others of Armstrong, in violation of its uniform marketing policy. (Tr. 5.152-5.155). There was no insidious threat here by Armstrong to yank or withhold all "assistance" whether or not related to TINS, in order to coerce Stern into withdrawing from its relationship with the plaintiff company. There is no evidence in the record that such a direct threat was ever made. There is no evidence in the record that in fact Armstrong did pull or yank any promotion or assistance that would otherwise have been available to Stern. Furthermore, Wolfe, TINS' man on the scene, at the time he was confronted with the promotional issue, knew exactly its limited context and so testified before this jury. It was patently unreasonable for plaintiffs to urge their argument on this point and equally unreasonable for the jury to agree. Indeed, both TINS and Fineman himself were aware of Armstrong's position no later than May 24, 1984, the day TINS and Stern signed the Letter of Intent. In Wolfe's exact words:

> Q. Now, in that May 24 meeting with Mr. Abrahamson, you and Mr. Fineman told Mr. Abrahamson that Armstrong would not reimburse Stern for the 59 cents illustration we have been talking about. Is that correct?
>
> A. No, I don't think that is correct, sir. I think that the conversation would have been more general in its nature. I don't recall a specific promotion from Armstrong being discussed. But, again, it would not surprise me at all. That would have been very

consistent with our honesty to have lowered expectations of an Armstrong participation.

Q. Well, based on your experience at that time, you had no expectation that Armstrong would pay Stern 59 cents under the assumptions that we have been making here on the chart. Is that correct?

A. Well, more specifically, that Armstrong would not go out of its way to lend an advantage to one of this [sic] distributors versus another distributor in the same geographical territory.

Q. And if Armstrong had paid Stern 59 cents on this promotional Sign-Up Special, and if Nelson and Small was not a TINS distributor, you would no longer have a level playing field up here. Is that right?

MR. KRAMER: Objection to the form of the question.

THE COURT: Objection overruled.

A. Yeah, I would say that's correct, sir.

Q. Now, Nelson and Small was an Armstrong wholesaler for resilient back in 1984. Is that correct?

A. Yes, sir.

> Q. And I believe you testified yesterday that, correct me if I'm wrong, that it's generally known in the floor covering industry that Armstrong has a level playing field policy for it's --
>
> A. I would say absolutely, sir.
>
> Q. Very strong policy?
>
> A. It's by my experience.

(Tr. 6.16:3-6.17:11). No jury could reasonably accept plaintiffs' rhetoric about Armstrong's actions with Stern regarding promotional assistance in the face of this testimony from TINS' most knowledgeable witness on that subject.

Plaintiffs' arguments based on the classification of certain events and items as "confidential" is the most blatant example of pulling single words out of context to generate an irrational conclusion. The evidence showed that the Roth-Abrahamson meeting of June 7, 1984 was considered confidential by the participants. The Humphrey memo of June 12, 1984 was also labeled "confidential." In addition, Armstrong's distributorship agreement with wholesalers provides:

> From time to time during the performance of this Agreement, the Wholesaler will become privy to various information considered by Armstrong to be confidential. It is mutually agreed that disclosure of such confidential information by the Wholesaler to any third person or entity will be adequate cause for the termination of this Agreement.

(Nelson & Small Agreement, Px. 1244, ¶ 11). The plaintiffs claim that the very fact that the June 7, 1984 meeting between

Roth and Abrahamson was classified "confidential" permits the inference from Roth's statements regarding TINS that Armstrong acted with the necessary malice. (Tr. 39.71- 39.73 (Kramer Closing)). This argument is based on pure speculation and ignores the proper context of the meeting. The meeting was properly deemed "confidential" since it involved a broad range of topics dealing with Sterns' business, including financial information. The plaintiffs would have the Court believe that, since the meeting was deemed "confidential" and the TINS system was mentioned, a reasonable juror could find that some dubious, sinister plot existed to destroy TINS because the disclosure of "confidential information" is cause for termination of a distributorship agreement. This speculative quantum leap is based solely on the use of the common, multidimensional term "confidential," without regard to the particular, different context of each use of the term. This Court finds that no juror could make such a connection through a reasonably drawn inference, but only through the impermissible conjecture urged by plaintiffs' counsel.

The plaintiffs also assert that the "Confidential" marking on the top of Humphrey's June 12, 1984 memo (Px 525) would allow a reasonable inference that Armstrong acted intentionally and wrongfully. (Tr. 39.71-39.73 (Kramer Closing)). No reasonable jury could draw such an inference. Even if the explanations of Humphrey and Draeger are disregarded, the only permissible, reasonable inference is that this memo was marked confidential to restrict those who would have access to it at Armstrong. The "confidentials" in the Humphrey memo, in the distributor agreements, and in the Roth-Abrahamson meeting are simply not rationally related in any way. This is particularly true where, as here, there is neither direct nor circumstantial evidence that the contents of the June 12 memo were ever revealed to Stern.[19]

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[19] Indeed the evidence reveals that Abrahamson's last contact with Armstrong (Roth) was (at the latest) June 8, 1984. Note the strained, unsuccessful efforts of plaintiffs and their counsel to generate later meetings between those gentlemen. (*See infra* at 59-60.)

Plaintiffs argue as well that the distributorship agreement provides an incentive for concealment, including perjured testimony before this Court, to avoid termination by Armstrong for revelation of "confidential" information. (Tr. 39.72 (Kramer Closing)). This was another emotional, impassioned, incendiary plea to the jury to draw an impermissible inference. Indeed, the prevalence and emphasis on this argument before the jury in summation prejudiced Armstrong before the jury and contributed significantly to a verdict based not upon reason, objectivity and evidence, but, despite cautions by this Court, upon emotion, speculation, sympathy and impermissible inferences.

The picture painted by the plaintiffs, with their counsel as the artist, was not realism, as it must be for the jury to rationally ascertain and decide the truth, but surreal, a Dali (Salvador Dali, surrealist painter, known for the illogical and inconsistent images of his paintings). The plaintiffs have painted a detached nose in one corner with their unsupported "assistance" argument. The plaintiffs then painted a detached mouth with only one lip, representing the incompleteness and disregarded context of its use of Roth's statements on June 7, 1984. The plaintiffs' use of three unrelated references to the term "confidential," in order to ascribe some significance to it, was the painting of three detached eyes spread far apart and completely unconnected. Then, having pointed out these pieces, the plaintiffs asked the jury to draw lines between them to establish a face portraying malicious intent and wrongful conduct. However, to continue the analogy, the lines do not meet in such a fashion. Instead, connecting these pieces (an effort which itself required rank speculation) leaves the reasonable juror with only a surreal image bearing no resemblance whatsoever to a realistic portrait.

The following language of the D.C. Circuit is particularly appropriate in the present matter:

> We are of course hesitant to nullify a jury's findings of fact. ... But the jury's primacy as factfinder cannot exempt it from the bounds of reasonableness. A

> defendant who is clearly not responsible for a harm should not have to pay for it. ... The court submits to the jury only those issues on which the party with the burden of proof offers "significantly probative" evidence. ... This judicial screening undoubtedly involves the court in some gauging of probabilities, but only at the extremes.... Performance of the task is an essential backstop to judicial definition of the law; if courts' endorsement of verdicts is automatic, the law, however, sound, can simply drift off into irrelevance as juries do their will.

Drabkin v. Alexander Grant & Co., 905 F.2d 453, 457-58 (D.C. Cir.), *cert. denied*, ___ U.S. ___, 111 S. Ct. 559 (1990) (citations omitted). In this case, the jurors' verdict was also without rational, reasonable evidentiary foundation. (*Id.*)[20]

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[20] The plaintiffs, both at trial and in opposition to the present motions, place undue reliance on evidence as to 1983 events. The Court, over objection by the defendant, admitted such evidence (including memoranda) from the latter part of 1983 for whatever its probative value might be regarding the claims in the present suit. Even ascribing to the 1983 evidence the maximum weight and materiality which a jury could rationally accord to it, that evidence is insufficient (even when considered with all other relevant evidence) to sustain plaintiffs' claims. This evidence is admittedly remote in time from the commission of the alleged torts in June 1984. Furthermore, there were significant intervening events, including the settlement agreement and the successful sign-up of Armstrong distributors without objection by the defendant, such that the 1983 evidence does not provide sufficient additional support for the jury verdict to permit it to withstand the defendant's motion for J.N.O.V. For a more detailed review of the particular 1983 evidence, see the section of this opinion regarding TINS' claim for punitive damages.

2. *Proximate Cause*

Even if this Court had determined that there was sufficient evidence to prove tortious conduct by Armstrong, the Court would nonetheless grant defendant's motion for J.N.O.V. on the ground that there was no evidence on the question of proximate cause. Proof that Armstrong's conduct was a proximate cause of plaintiffs' injuries is a required element on which the plaintiffs bore the burden of proof.

All of the relevant evidence on the question of Armstrong's conduct is discussed in the sections concerning the wrongfulness of Armstrong's conduct. Of such evidence, only Roth's statement and the promotional information conveyed to Fischer were ever conveyed to Stern. Even if considered with all other evidence, including Armstrong's strength as Stern's creditor and supplier, the evidence is grossly insufficient as a matter of law to prove causation, that is that Stern withdrew as a result of pressure from Armstrong. Even the supposed threat of withdrawing promotional assistance (the June 12, 1984 memo) was never communicated to Stern; it cannot therefore constitute a cause of Stern's decision to withdraw from TINS. There is a complete failure to prove proximate cause.

Indeed, the plaintiffs engaged in a conscious, tortured effort to directly improve on the evidence by placing Roth with Abrahamson on more occasions than June 7. Early in the trial, Fineman testified that Roth met with Abrahamson on June 14, June 21 and June 26. (Tr. 2.71). Plaintiffs' counsel, on direct examination of Fineman, then made a concerted effort to line up the Roth-Abrahamson meetings with the days that Stern employees should have had appointments with retailers to present the TINS program. (Tr. 2.78). Then, of course, Fineman would be able to testify that no such appointments were made, leading to the presumption that none were made because of Roth's meetings with Abrahamson during the relevant period. However, in the middle of this, defense counsel objected and the Court conducted a sidebar conference. At the conference, plaintiffs' counsel could not identify the source of Fineman's information about the Roth-Abrahamson meetings, and so the Court recessed for lunch.

Upon returning from the break, counsel and the Court reviewed the foundation for Fineman's testimony that Roth met with Abrahamson after the June 7 meeting. It was thereupon revealed that the calendar upon which Fineman relied, indicating meetings with Roth after June 7, in fact belonged to another distributor, not Abrahamson. (Tr. 2.82-2.85). The Court was therefore required to give a curative instruction to the jury that there were no such meetings. (Tr. 2.88-2.89). At the time, on the second day of the trial, it appeared that the entire matter was simply an excusable, inadvertent error on the part of plaintiffs and their counsel. Whether or not that remains the Court's conclusion, this transparent effort is symptomatic of plaintiffs' case as a whole which was based on speculation, innuendo and appeals to the jurors' emotions, unsubstantiated by the evidence adduced at trial.

The record is therefore critically devoid of any evidence showing that Stern's decision to back out of the TINS distributorship was made as a result of any pressure or threat from Armstrong. At the very most, it could reasonably be concluded that Abrahamson believed that Armstrong would not support the program through special resilient promotions that would be available for him solely because he was a TINS distributor. While this belief might have been an ingredient in Abrahamson's decision, Armstrong's actions did not rise to the level of being a proximate cause for that decision to withdraw Stern from the TINS program; and no reasonable juror could conclude otherwise.

D. *Elliot Fineman's Individual Tort Claim*

The jury awarded Elliot Fineman $2.275 million in damages on his claim that Armstrong's tortious interference with TINS' relationship with Stern injured his reputation and goodwill as a consultant to the floor covering industry. Armstrong's entitlement to J.N.O.V. on the tortious interference claim necessarily entitles it to J.N.O.V. on this individual claim as well. However, even if the jury's verdict survived as to TINS, Armstrong is nonetheless entitled to J.N.O.V. as to Fineman's individual claim. There is a critical insufficiency of evidence showing, either directly or by permissible inference, that Armstrong specifically intended to injure Fineman in his

individual capacity when it allegedly interfered with the Stern/TINS relationship.

The elements of a claim for tortious interference are based primarily on the *Restatement (Second) of Torts*, as described above. The comments to the Restatement help to interpret it. Specifically relevant to the present question is comment p to § 766, which states in relevant part:

> The person protected by the rule stated in this Section is the specified person with whom the third person had a contract that the actor caused him not to perform. To subject the actor to liability under this rule, his conduct must be intended to affect the contract of a specific person. It is not enough that one has been prevented from obtaining performance of a contract as a result of the actor's conduct ... thus, if A induces B to break a contract with C, persons other than C who may be harmed by the action as, for example, his employees or suppliers, are not within the scope of the protection afforded by this rule, *unless A intends to affect them. Even then they may not be able to recover unless A acted for the purpose of interfering with their contracts.* (See § 767 comment h.)

(*Restatement (Second) Torts*, § 766, comment p) (emphasis added). Under this rule, arguendo, defendant Armstrong is A, Stern is B, and TINS is C. Fineman is a person other than C who is allegedly harmed as a result; and, indeed, is alleging a different financial injury than that sustained by C (TINS). Accordingly, Fineman has a cause of action only if A